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XXI

1867

I.

**PLEADINGS AND OTHER PAPERS DESIGNATED.**

1867

Filed Feb 15 1944

District Court of the United States for the District of  
Columbia.

Civil Action No. 22822.

ESQUIRE, Inc., Palmolive Bldg., Chicago, Ill. *Plaintiff*,  
against

FRANK C. WALKER, as Postmaster General of the United  
States, *Defendant*

*Amended Complaint for Injunction*

Plaintiff, for its amended complaint herein, alleges:

1. This is an action of a civil nature, brought to enjoin the enforcement of an order, dated and filed December 30, 1943, made by defendant, as Postmaster General of the United States, revoking the second-class mailing privileges of the publication Esquire, effective February 28, 1944.

2. Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is a citizen and resident of that state.

3. Defendant Frank C. Walker is, and at all times since September 11, 1940, has been, Postmaster General of the United States and head of the Post Office Department, an executive department of the United States, and on information and belief, as Postmaster General, is a citizen and resident of the City of Washington, District of Columbia.

4. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

1869 5. The action arises under, and involves the interpretation of, the following acts of Congress: 20 Stat. 359 (39 U. S. C. 226) and 31 Stat. 1107 (39 U. S. C. 232).

6. One of the principal activities of plaintiff since 1933 has been the publication, distribution and sale of the monthly periodical, *Esquire Magazine*.

7. On December 15, 1933, plaintiff applied for and received second-class mailing privileges for said monthly periodical, and has since that date continued to enjoy said privileges uninterrupted.

8. During said period plaintiff has expended substantial sums of money in carefully building up among the public a valuable reputation and good will for *Esquire Magazine* which constitutes a substantial asset of plaintiff's business.

9. The present monthly circulation of *Esquire Magazine* amounts to approximately 700,000 copies; approximately 400,000 copies are sold generally throughout the United States on newsstands, and approximately 300,000 copies are sent monthly to subscribers through the United States mails as second-class matter at second-class rates.

10. 20 Stat. 359 (39 U. S. C. 226) provides as a condition for enjoyment of second-class mailing privileges; among other things, as follows:

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry, and having a legitimate list of subscribers."

11. *Esquire Magazine* has a legitimate list of subscribers; is originated and published for the dissemination of information of a public character; and is also devoted to literature, the arts, the sciences and in part to the special industry of clothing.

1870 12. Plaintiff's publication, *Esquire*, satisfies, and at all times mentioned herein has satisfied, all statutory conditions for second-class mailing privileges.

13. 31 Stat. 1107 (39 U. S. C. 232) provides, in substance, that when any publication has been accorded second-class mailing privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested.

14. On information and belief, on September 11, 1943, defendant purporting to act under 31 Stat. 1107 (39 U. S. C. 232) instituted a proceeding and caused to be sent to plaintiff by registered mail a citation requiring plaintiff to show cause on September 28, 1943, why the second-class mailing privileges enjoyed by plaintiff in the mailing of its monthly periodical, *Esquire Magazine*, should not be suspended, annulled or revoked upon the following grounds:

"(a) That it is nonmailable within the meaning of 35 Stat. 1129 (18 U. S. C. 334), in that issues dated January, February, March, April, May, June, July, August, and September, 1943, have contained matters described and portrayed as set forth in Exhibit 'A' attached hereto of an obscene, lewd and lascivious character; and other matter of a similar or related nature;

"(b) That because of the inclusion of such matter in the publication it has not fulfilled the qualifications of second-class mailing privileges established by the Fourth condition of 20 Stat. 359 (39 U. S. C. sec. 226);

"(c) That it is not a mailable newspaper or other mailable periodical publication of the second class of mailable matter as it, in a generally uniform and systematic manner, publishes nonmailable matter in that in issues dated January, February, March, April, May, June, July, August, and September, 1943, it has included matter such as is cited in Paragraph (a) hereof."

15. On information and belief, defendant purporting to act under 31 Stat. 1107 (39 U. S. C. 232) caused to be sent to plaintiff on October 4, 1943, an amended citation 1871 in said proceeding specifying the same grounds as those mentioned in paragraph 14 hereof, but adding to grounds (a) and (c) the issues of said magazine dated October and November, 1943.

16. On information and belief, thereafter, defendant selected and appointed, a Hearing Board consisting of Fourth Assistant Postmaster General, Walter Myers, Chair-



man, Chief Clerk and Director of Personnel, Frank H. Ellis; and Deputy First Assistant Postmaster General, Tom C. Cargill, to hear argument and take testimony, and to report to defendant its findings, conclusions and recommendations.

17. On October 18, 1943, the plaintiff filed an answer in said proceeding denying the charges set forth in said citations.

18. Hearings were held before said Board upon the issues raised by the aforementioned citations and answer for a period of seventeen days, from October 19, 1943, to November 6, 1943, at which hearings, testimony and exhibits were presented on behalf of plaintiff and the Post Office Department.

19. On information and belief, on or about November 11, 1943, the majority of the Hearing Board rendered its report in writing, in which it found and concluded that

The charge of obscenity in the original and amended citations has not been supported and proved in fact or in law.

The publication has not failed to comply with the 4th condition of section 226 Title 39 of the U. S. Code as to its second class mailing entry.

and accordingly recommended that the proceeding to suspend, revoke or annul the second-class mailing privileges of Esquire Magazine "be dismissed, and that the second-class entry of the magazine Esquire be continued in full force and effect."

1872 20. On information and belief, defendant, notwithstanding the aforesaid report, findings, conclusions and recommendation of the majority of the Hearing Board selected and appointed by him to conduct said proceeding, and in complete disregard thereof, issued an order in said proceeding on December 30, 1943, (Order 23459) revoking the second-class mailing privileges of Esquire Magazine, effective February 28, 1944. A copy of said order is annexed hereto as Exhibit A and made a part hereof.



21. On information and belief, defendant, in issuing said order of December 30, 1943 (Exhibit A), misconstrued 20 Stat. 359 (39 U. S. C. 226) and particularly the Fourth condition thereof; proceeding upon an erroneous construction of the words "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry", in that, among other errors, he determined that the statutory language should be limited to such information of a public character, literature, sciences, arts and special industries as might be considered by him to be for the public good and the public welfare.

22. On information and belief, second-class mailing privileges, pursuant to 20 Stat. 359 (39 U. S. C. 226), have been granted by the Postmasters General of the United States, over a period of many years, to periodicals and magazines of widely different types and descriptions, including some of the same general class, type and character as Esquire Magazine, without any attempted imposition by any Postmaster General of any condition of the character set forth in the order and decision (Exhibit A) of the defendant herein.

The number of periodicals and magazines which have been accorded such privileges and which are regularly being mailed as second-class matter at second-class rates is in excess of 25,000.

23. On information and belief, the construction of 20 Stat. 359 (39 U. S. C. 226) urged by defendant as the purported justification of the aforesaid order of December 30, 1943 (Exhibit A) is directly contrary to the long established and uniform practical construction of said statute by the Postmasters General of the United States since the origin of said statute.

24. On information and belief, defendant, in making the aforesaid order of December 30, 1943 (Exhibit A), acted arbitrarily and capriciously and contrary to the provisions of 20 Stat. 359 (39 U. S. C. 226), for the reasons, among others, that: (1) he did not review the record on the merits

but reached his determination solely for the purpose of compelling a court review of his theory of the meaning of the statute; (2) said order is contrary to the express findings, conclusions, and recommendation of the Hearing Board appointed by defendant for the express purpose of hearing the evidence and making findings, conclusions and a recommendation; (3) said order is not supported by any evidence in the record in said proceeding; (4) said order is based upon a misconstruction of 20 Stat. 359 (39 U. S. C. 226) as more particularly alleged in paragraph 21 hereof; and (5) said order is contrary to the established practice of the Post Office Department and the Postmasters General as more particularly alleged in paragraphs 22 and 23 hereof.

25. On information and belief, defendant's aforesaid order of December 30, 1943 (Exhibit A) violates plaintiff's constitutional rights as guaranteed under the First 1874 and Fifth Amendments to the Constitution of the United States in that (1) the statute (39 U. S. C. 226) as construed by defendant's said order is unconstitutional in that it amounts to an unlawful interference with, and abridgement and denial of, the freedom of the press; (2) defendant's said order arbitrarily discriminates against plaintiff in relation to other periodicals of the same general class, type and character; (3) defendant's said order, by permanently revoking plaintiff's second-class mailing privileges because of an alleged failure of past issues of the magazine to conform with defendant's interpretation of the statute (39 U. S. C. 226), imposes a previous restraint or restriction on any practical future use by plaintiff of the mails which is tantamount to a denial of the right of circulation and therefore constitutes an unlawful interference with, and abridgement and denial of, the freedom of the press; and (4) defendant's said order is invalid and unauthorized in that defendant unlawfully seeks to usurp the powers of the Congress of the United States to determine what shall be carried in the mails as second-class matter by attempting to impose additional requirements for and limit

tations upon the privilege of second-class mailing. Defendant in effect assumes, without statutory authority and in direct violation of the Bill of Rights, to act as a universal censor of the press and of public morals.

26. The aforesaid order of December 30, 1943 (Exhibit A), threatens the life of plaintiff's magazine Esquire and in any event must seriously diminish the circulation of said magazine both on newsstands and to subscribers with the result that plaintiff will suffer substantial and irreparable loss and damage, for which it has no adequate remedy at law, for the following reasons, among others:

1875 A. The good will and reputation of Esquire Magazine, which plaintiff has carefully built up from its inception in 1933, will be seriously impaired.

B. It is the settled custom among the major distributing companies to refuse to distribute magazines which are not afforded second-class mailing privileges.

C. The present cost to plaintiff of sending Esquire Magazine through the United States mails to its subscribers at second-class rates amounts to approximately \$112,800 annually or approximately \$9,500 monthly.

D. ~~In order for~~ plaintiff to continue to furnish its subscribers with future copies of Esquire Magazine, it will be required to mail said magazine at fourth-class rates.

E. On information and belief the cost to plaintiff of sending said magazine to its subscribers at fourth-class rates will amount to approximately \$624,000 annually, or upwards of \$52,000 per month.

F. If plaintiff were to discontinue the subscription contracts to Esquire Magazine, it would be necessary to refund a large amount of money on subscription orders to over 300,000 subscribers.

27. By reason of the foregoing, plaintiff prays that an injunction both *pendente lite* and permanent be granted, as more particularly set forth in the prayers for relief herein, restraining and enjoining defendant from carrying out or

permitting the aforesaid order of December 30, 1943, revoking the second-class mailing privileges of Esquire Magazine to become effective.

1876 Wherefore, plaintiff prays:

1. That a summons issue requiring defendant to make answer to this complaint.

2. That defendant be ordered to file with the Clerk of this Court the entire record and proceedings had before the Post Office Department in connection with the proceeding instituted by the defendant to revoke the second-class mailing privileges of Esquire Magazine.

3. That defendant be ordered to show cause on a date to be fixed by this Court, why an injunction should not be granted, pending the final determination of this cause, restraining and enjoining the defendant, and each of his officers, agents, assistants, including the postmasters throughout the United States, employees, workers and attorneys, and anyone associated with or acting in concert or participation with him, and his successors in office, and each of them, and their officers, agents, assistants, including the postmasters throughout the United States, employees, representatives and attorneys, and anyone associated with or acting in concert or participation with them, from causing or permitting to become effective, and from promulgating, publishing or holding out, or causing or permitting to be promulgated, published or held out, as effective or valid or authorized by law, the purported order revoking the second-class mailing privileges of Esquire Magazine, and from refusing to transmit said magazine through the mail as second-class matter, at second-class rates.

4. That upon final hearing of this cause this Court grant, decree and issue a permanent injunction restraining and enjoining the defendant, and each of his officers, agents,

1877 assistants, including the postmasters throughout the United States, employees, workers and attorneys, and anyone associated with or acting in concert or participation with him, and his successors in office, and each of

them, and their officers, agents, assistants, including the postmasters throughout the United States employees, representatives and attorneys, and anyone acting with, or acting in concert or participation with them, from causing or permitting to become effective, and from promulgating, publishing or holding out, or causing or permitting to be promulgated, published, or held out, as effective or valid or authorized by law, the purported order revoking the second-class mailing privileges of Esquire Magazine, and from refusing to transmit said magazine through the mail as second-class matter, at second-class rates.

5. That upon final hearing this Court declare and order, adjudge and decree that the purported order revoking the second-class mailing privileges of Esquire Magazine issued by defendant under date of December 30, 1943, is invalid and unauthorized in law.

CRAVATH, de GERSDORFF,

SWAINE & WOOD;

15 Broad Street,

New York, N. Y.

616-621 Transportation Building,  
Washington, D. C.

and

HUGH LYNCH, JR.,

616-621 Transportation Building,

Washington, D. C.

*Attorneys for Plaintiff.*

By HUGH LYNCH, JR.

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Filed Feb 15 1944

State of Illinois, County of Cook, ss:

Arnold Gingrich, being duly sworn, deposes and says:

That he is vice-president of Esquire, Inc., a foreign corporation, the plaintiff named in the foregoing action and amended complaint; that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason why this verification is made by deponent and not by plaintiff is that plaintiff is a foreign corporation and deponent an officer thereof, to wit, vice-president; that the sources of deponent's knowledge and the grounds of his belief as to the matters stated in said amended complaint to be alleged on information and belief consists of documents in the possession of deponent and plaintiff's attorneys, and conversations had with representatives of plaintiff and its attorneys.

ARNOLD GINGRICH

Sworn to before me this 11th day of February, 1944.

LORETTA A. DIEBOLD

*Notary Public*

[County Clerk's Certificate Attached.]



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Filed Feb 15 1944

(EXHIBIT A)

This is a conformed copy. Original filed, December 30, 1943, in Office of Chief Clerk, Post Office Department.

NBW

December 30, 1943

Order No. 23459

This is a proceeding under the Act of March 3, 1901 relating to the second-class mailing privileges accorded to the publication "Esquire" which was instituted by an order served upon "Esquire" and its publisher by registered mail on September 12, 1943 to show cause on September 28, 1943 why the second-class mailing privileges enjoyed by "Esquire" should not be suspended, annulled or revoked upon the following grounds:

"(a) That it is nonmailable within the meaning of 35 Stat. 1129 (18 U. S. C. 334), in that issues dated January, February, March, April, May, June, July, August, and September, 1943, have contained matters described and portrayed as set forth in Exhibit A attached hereto of an obscene, lewd and lascivious character; and other matter of a similar or related nature;

"(b) That because of the inclusion of such matter in the publication it has not fulfilled the qualifications of second-class mailing privileges established by the Fourth condition of 20 Stat. 359 (39 U. S. C. sec. 226);

"(c) That it is not a mailable newspaper or other mailable periodical publication of the second class of mailable matter as it, in a generally uniform and systematic manner, publishes nonmailable matter in that in issues dated January, February, March, April, May, June, July, August, and September, 1943, it has included matter such as is cited in Paragraph (a) hereof."



An exhibit containing the matter printed in various issues of "Esquire" held to be in violation of the postal 1881 statutes accompanied the communication to the publisher.

At the request of counsel for the publication, postponements of the hearing were granted, first to October 12 and later to October 19 on which day the hearing began before a Board of three hearing officers. Testimony was given and exhibits were introduced both in behalf of the respondent and the Solicitor of the Post Office Department. The hearing continued through November 6.

The hearing officers submitted to the Postmaster General their respective recommendations on November 11, 1943, together with the transcript of the proceeding, which included the testimony, the statements and arguments of the parties and the exhibits and briefs.

In view of this voluminous record, at the onset it may be well to clarify and state just what is the issue in this proceeding. This is a proceeding involving the use of the second-class mailing privileges. Consequently, there is not involved the question of nonmailability as first, third or fourth-class mail matter nor of the right of freedom of speech, or of the freedom of the press. Nor are we here concerned with the question of whether a criminal prosecution against the publishers might or might not be sustained by the same or similar evidence.

Proceedings to suspend, annul, or revoke second class mailing privileges are not criminal proceedings. The 1882 questions in issue are not the acts of the owner, publisher or editor. The single issue is the character of the publication, and whether that publication meets the conditions set out by the Congress in respect of its use of the second-class mailing privileges.

This proceeding presents but two questions for consideration:

(1) Does the publication fail to comply with the Fourth condition of the Act of March 3, 1879, section 14 (20 Stat.

359; 39 U. S. C. 226) and thus not being originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, is not entitled to second-class mailing privileges.

(2) Is the publication non-mailable within the meaning of the Act of March 4, 1909, section 211 (35 Stat. 1129; 18 U. S. C. 334) and thus being a non-mailable publication is not entitled to second-class mailing privileges.

In arriving at a determination in this particular type of proceeding it is necessary that the Postmaster General recognize the nature, conditions and result of these unique second-class mail privileges because they have been established and are supported and maintained by the people of the United States:

In nature they are true privileges, specifically called and referred to as such by the postal statutes, and stated by the Supreme Court to be " . . . justified as part of the historic policy of encouraging by low postal rates the dissemination of current intelligence". It is a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes is derived from the newspaper and other periodical press. " 1

Furthermore, to assure that a contribution of that precise character is in fact made, Congress has required that to enjoy these privileges and preferences the publication as a fourth condition " must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry . . . " 2

There are good reasons for this jealous regard by Congress of these extraordinary privileges. One fact not unimportant is that as a result of the second-class mail privileges the United States Postal Service is compelled to

<sup>1</sup> Milwaukee Pub. Co. v. Burleson, 255 U. S. 407, 410.

<sup>2</sup> Section 14, Act of March 3, 1879 (20 Stat. 359; 39 U. S. C. 226)

1884 make up the difference between the postage paid by the publication and the cost to the United States Postal Service to distribute the publication through the mails. This in effect is an indirect subsidy at the hands of the Government. The holder of these privileges thus can use the United States mails to effect delivery of his product to his customers, with the assurance it will receive certain preferential handling and services which accrue to no other class of mail, by the payment of but a fraction of the cost of the service.

In other words, by this special favor granted him, the cost of delivery is paid in part by every single person mailing a letter and by every single person paying Federal taxes.

Examination of the record, briefs, and reports of the hearing officers indicates two diametrically opposed theories of the case as to the Fourth condition. The theory of the publication appears to be that the requirement that a publication "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry", is so general and "broad as to include everything and exclude nothing" if it be in fact a publication.

If this theory of the case is applied, it means that the Federal government, as a matter of national policy, 1885 intends to foster, subsidize, grant affirmative assistance and otherwise approve every kind of periodical publication irrespective of its contribution to the public welfare and the public good. Such a theory not only favors that particular class of mail users with a preferential postage rate and other privileges which no other user of the mail is permitted to have, but requires that the Federal government make up the difference between the amount of postage paid and the cost to the Postal Service to deliver it throughout the United States.

The contrary theory advocated during the proceeding goes to the other extreme. This theory of the case contemplates the Fourth condition as a continuing requirement that a

publication must serve a useful public purpose; educationally or otherwise; that a publication "originated and published for the dissemination of information of a public character" is synonymous with current newspapers and current news magazines; and that "literature, the sciences, arts," means "classic literature", the "fine arts" and the "useful arts".

If this theory is applied, it means that a large number of publications and periodicals of the editorial, fiction and humorous classes, which even though educational, innocent, delightful and entertaining, would not be permitted to use the second-class mailing privileges because they are substantially devoted to literature or art of a classical or high artistic quality.

The three hearing officers recognized and gave the Postmaster General the benefit of their careful considerations of these diametrically opposed theories of the case. But they did not reach a unanimity of conclusion as to interpretation or recommendation.

My attention has been called by arguments of counsel in the record and in the briefs to the decisions and language in many cases, and to the administrative practices and interpretations. I am unable to reconcile them. Neither in them can I find such consistency and uniformity in declaration of principles as to amount of consistent precedent.

Over the years the decisions affecting the matters here in issue and their administration have been inconsistent. From language in court decisions having some analogy to the matters here in issue, opposite conclusions may be reached. From the interpretations and practices of the officials administering this statute over the years, opposite conclusions may be reached. Furthermore, the cases and the administrative interpretations are inconsistent. I am unable to find any case since the enactment of this statute where the courts have had this clear-cut issue before them, nor can I

find a case which decides just what the statute means as to second-class mail privileges.

I do not believe that a statute which so vitally, directly, and continually affects so many should remain longer in the realm of doubt or be subject to the vagaries of whatever Postmaster General may then be administering them.

In the first instance, it is for our courts to say what this statute means and what limits and restrictions there are upon the use of the second-class mail privileges. If our courts conclude that the Fourth condition is a series of words without meaning, and that under it the Postmaster General actually cannot and should not revoke or deny second-class mailing privileges to publications such as this, then it is for the Congress to unequivocally and clearly state what if any are the standards to which a publication must conform before Congress will permit it to be given the cheapest rate of postage and contribute government funds to pay its cost of distribution by mail.

If, on the other hand, our courts determine that the Postmaster General has the power and duty to enforce the plain and common-sense meaning of this statute, and as well, to correct now the long-standing inconsistency and lack of uniformity in administrative interpretation and practice in this type of case, then it is for the Congress in the light of such a decision to determine what restrictions and limitations in the public interest are proper to be placed upon such a power and duty.

Whether the dicta and decisions in somewhat analogous cases, as well as administrative interpretation and practices over the years, have so eaten away at this statute as to effectively nullify it is a decision for our courts and not for the Postmaster General.

This is essentially a judicial matter of deep significance, and the Postmaster General should not be hesitant in exposing these conditions to the critical public eye. Nor should he be reluctant to determine the matter in such a way that all phases of it may be fully considered and decided by a court of competent jurisdiction where every right and interest of the publication, the government, and the public may be fully protected.

In the absence of specific decision by our courts, and in view of the inconsistency in analogous cases and in administrative interpretations and practices, I am compelled to resort to the statutes themselves.

The language of the Act of Congress establishing the Fourth condition seems plain and specific. I am unable to distort the plain meaning of plain words.

The plain language of this statute does not assume that a publication must in fact be "obscene" within the 1889 intentment of the postal obscenity statutes before it can be found not to be "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry".

Writings and pictures may be indecent, vulgar, and risqué and still not be obscene in a technical sense. Such writings and pictures may be in that obscure and treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good. When such writings or pictures occur in isolated instances their dangerous tendencies and malignant qualities may be considered of lesser importance.

When, however, they become a dominant and systematic feature they most certainly cannot be said to be for the public good, and a publication which uses them in that manner is not making the "special contribution to the public welfare" which Congress intended by the Fourth condition.

A publication to enjoy these unique mail privileges and special preferences is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare.

The editor of this publication admits that from its 1890 origin "our humor and our articles and our fiction, all stressed a man alone angle—you might call it a



stag party type of treatment",<sup>3</sup> and testified "we called it the smoking room type of humor".<sup>4</sup> He stated that as a part of its editorial policy it runs "cartoons that do feature sex".<sup>5</sup> Its featured pictures are stated to be "frankly published for the entertainment they afford".<sup>6</sup> But when the polls of public opinion submitted by the publication are examined, it is found that these pictures were characterized as obscene or indecent by 19 to 22% of the persons interviewed, and that 20 to 26% of the persons polled would object to having them in their homes.<sup>7</sup>

The result of the distribution of such a publication is not without significance. As the publication's editor testified, Esquire "attracted a good number of imitators. There were various magazines which had various other related titles to that of Esquire, but the imitation copied only the superficial aspects, the smoking-room type of humor, much, much grosser than anything we had ever used ourselves".

These imitators "would simply trade upon the superficial aspects of Esquire and emphasize what to us were the features that we least wanted to see become cheapened and common".<sup>8</sup> "I wouldn't say coarsened, but they cheapened almost the desirability and value of that kind of material by making it a commonplace, whereas we had thought of it as being a smart and an exclusive type of feature".<sup>10</sup>

Whatever the featured and dominant pictures, prose, verse and systematic innuendos of this publication may be, they surely are not "information of a public character" or "literature, the sciences, arts or some special industry".

<sup>3</sup> Transcript of proceedings, page 1627.

<sup>4</sup> Transcript of proceedings, page 1794.

<sup>5</sup> Transcript of proceedings, page 1798.

<sup>6</sup> Transcript of proceedings, page 28.

<sup>7</sup> Respondent's exhibits 90 and 93.

<sup>8</sup> Transcript of proceedings, page 1631.

<sup>9</sup> Transcript of proceedings, page 1634.

<sup>10</sup> Transcript of proceedings, page 1797.

I am unable to conclude that this publication complies with the Fourth condition or that Congress did intend or now intends that this publication be entitled to enjoy the second-class mailing privileges. I cannot assume that Congress ever intended to endow this publication with an indirect subsidy and permit it to receive at the hands of the government a preference in postal charges of approximately \$500,000 per annum.<sup>11</sup>

In order to provide the publication ample opportunity to appeal this order to a court of competent jurisdiction to fully review and settle this matter in which the publication, the Post Office Department, and the general public have such a direct and substantial interest, the order revoking the second-class privileges of the publication will not become effective for 60 days.

Accordingly, the second-class mailing privileges of the publication "Esquire" are hereby revoked, effective February 28, 1944.

(Signed) FRANK C. WALKER

*Postmaster General.*

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Filed Feb 8 1944

*Stipulation*

It is stipulated and agreed by and between the parties to the above entitled cause by their respective attorneys below named:

1. That the plaintiff shall be allowed to continue to mail its publication "Esquire" at Chicago, Illinois, New York, New York, and other Post Offices as second class matter at second class rates until the issues presented in this action are ultimately decided by the highest court which may consider the case.

<sup>11</sup> Transcript of proceedings, page 22.

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2. In the event it is ultimately decided by the highest court which may consider the case that the plaintiff is not entitled to mail its said publication at second class rates, the plaintiff agrees that it will pay to the Post Office Department the difference between said second class rates and fourth class rates for the period from February 28, 1944, to the date of such final decision.

3. The record of proceedings had before the Post Office Department Hearing Board, including the exhibits which were offered at said hearing, shall be deemed to be a part of the Answer in this case without physically annexing the same thereto and the said record, including said exhibits, shall be available to plaintiff's counsel at all reasonable times.

CRAVATH, de CERSDORFF,  
SWAINE & WOOD

By BRUCE BROMLEY  
JOHN F. HARDING

HOGAN & HARTSON

By EDMUND L. JONES  
HOWARD BOYD

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FRANCIS M. SHEA

*Assistant Attorney General*

EDWARD M. CURRAN

*United States Attorney in and for  
the District of Columbia.*

Approved:

T. ALAN GOLDSBOROUGH

*Justice.*

1894

Filed Apr 25 1944

*Answer*

Comes now the defendant, Frank C. Walker, as Postmaster General of the United States, through his attorneys, and for answer to the amended complaint filed herein says:

1. Defendant admits the allegations contained in paragraph 1.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.

3. Defendant admits the allegations contained in paragraph 3, except that he denies that he is a citizen of the City of Washington, District of Columbia.

4. Defendant admits the allegations contained in paragraph 4.

5. Paragraph 5 requires no answer.

1896 6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6.

7. Defendant admits the allegations contained in paragraph 7, excepting that said second-class mailing privilege was revoked by the defendant effective February 28, 1944.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8.

9. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9. Defendant admits that numerous copies of the magazine Esquire were sent through the mails each month at second-class rate of postage.

10. Defendant admits the allegations contained in paragraph 10.

11. Defendant denies the allegations of paragraph 11, except that defendant admits the magazine Esquire has a legitimate list of subscribers.

12. Defendant denies the allegations contained in paragraph 12.

13. Defendant admits the allegations contained in paragraph 13.

14. Defendant admits the allegations contained in paragraph 14.

15. Defendant admits the allegations contained in paragraph 15.

1897 16. Defendant admits the allegations contained in paragraph 16.

17. Defendant admits the allegations contained in paragraph 17.

18. Defendant admits the allegations contained in paragraph 18.

19. Defendant admits the allegations contained in paragraph 19.

20. Defendant denies the allegations contained in paragraph 20, except that he admits that he issued an order dated December 30, 1943, No. 23459, revoking the second-class mailing privilege of the magazine Esquire, effective as of February 28, 1944, as set forth in the copy of said order annexed to the amended complaint as Exhibit "A".

21. Defendant denies the allegations contained in paragraph 21.

22. Defendant denies the allegations contained in paragraph 22, except that he admits that more than 25,000 publications have been accorded second-class mailing privileges and are being regularly mailed as second-class matter at second-class rates.

23. Defendant denies the allegations contained in paragraph 23.

24. Defendant denies the allegations contained in paragraph 24.

25. Defendant denies the allegations contained in paragraph 25.

26. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26.

1898 For further defense, the defendant says:

27. That as Postmaster General of the United States he is charged with the duties of administering the postal laws of the United States, including the duty of classifying mail matter into the classes prescribed by Congress, and particularly of determining which publications are entitled to classification as second-class mail within the applicable definition of Congress; whether any particular publication is entitled to such classification and the privileges incident thereto; and whether such classification and privileges, having been previously accorded to any publication should be annulled or revoked.

28. That in the performance of such duties, he caused notice to be sent to plaintiff to show cause why the classification of the magazine Esquire as a second-class mailing publication and the privileges accorded to it under such classification should not be revoked, as alleged in paragraph 14 of the amended complaint.

29. That in accordance with such notice, hearings were held before a board of officials of the Post Office Department, appointed by the defendant for that purpose, as alleged in paragraph 16 of the amended complaint. A large number of witnesses were heard by the Board, and much documentary evidence was submitted to it, all of which is shown by the record of such proceedings.

30. That the functions and duties of said Board were to hear and to consider the evidence introduced before it, and to advise and to recommend to the defendant the action which should be taken in the premises.

31. That at the conclusion of said hearing two members of the Board made a recommendation that the proceeding be dismissed and that the second-class entry of the magazine Esquire be continued in full force and effect. The third member of the Board recommended that the second-class privilege should be withdrawn.

32. That defendant fully considered the evidence presented to said Board and the recommendations made respec-



tively by the minority and majority members of the Board, and after such consideration, determined that the magazine *Esquire* for a long time past has not been published for the dissemination of information of a public character, nor has it been devoted to literature, the sciences, arts, or any special industry within the meaning of and as required by the fourth specification of Section 226 of Title 39 of the United States Code, and that it is not being published for or devoted to any such purposes or subjects. That in making said determination, defendant was required to and did exercise a judicial or quasi-judicial discretion duly vested in him by Congress; that defendant made said determination in good faith and in the exercise of a reasonable discretion; that said determination involved the decision of questions of fact requiring the exercise of judgment and discretion by defendant; that the said decision was based upon the evidence presented in the hearing; that said decision and determination are therefore conclusive; and that the exercise of his judgment and discretion by defendant is not subject to review or control by the Court.

1900. For further defense, the defendant says:

33. That the plaintiff has throughout the period here in question, to the detriment of the public welfare, and for purposes of its own commercial advantage, systematically included in its publication items of a salacious character, skirting as close to the edge of obscenity as it believed would avoid the loss of mailing privileges, all counter to the promotion of those purposes intended to be served by the second-class mailing privilege. That plaintiff has thereby been guilty of inequitable conduct in the matter with relation to which it seeks affirmative relief, and therefore this Court should decline to exercise its extraordinary powers of injunction in furtherance of plaintiff's improper ends.

34. There is made a part of this answer, the record of the proceedings before the Board of postal officials, with the exhibits attached thereto; in accordance with the provisions

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of a stipulation previously entered into between the parties hereto.

Wherefore, defendant prays that the cause be dismissed at plaintiff's costs.

FRANCIS M. SHEA

*Assistant Attorney General*

EDWARD M. CURRAN

*United States Attorney*

JOSEPH A. FANELLI

*Special Assistant to the Attorney General*

BENEDICT S. DEINARD

*Special Assistant to the*

*Attorney General*

*Attorneys for the Defendant*

WILLIAM S. WARD

*Attorney, Department of Justice*

*Of Counsel*

Service of copy of the foregoing answer acknowledged this 25th day of April, 1944.

HUGH LYNCH, JR.

1901

Filed Jun 7 1944

*Pretrial Proceedings*

Statement of Nature of Case:

This is a suit to enjoin the Postmaster General from enforcing an order revoking the second class mailing privileges of plaintiff's magazine, Esquire, and to have the court declare said order to be invalid and unauthorized by law. Plaintiff contends defendant has misconstrued the second class mail statute; that his construction would render the statute unconstitutional; and that his determination is not sustained by any evidence.

Defendant denies plaintiff's contentions, and contends that he was vested by statute with administrative discretion to determine whether or not plaintiff's magazine met the requirements of the second class mail statute; that defendant determined it did not meet the requirements of said statute; that said determination was based on substantial evidence and is therefore not subject to review by the courts. Defendant further claims that plaintiff is not entitled to equitable relief because it is without clean hands in that it has skirted as close to the edge of obscenity as it believed would avoid the loss of second class mailing privileges.

Stipulations: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent course of this action shall be governed by the following stipulations, unless modified by the Court to prevent manifest injustice:

1. Defendant in this suit does not defend on the contention that plaintiff's magazine is obscene within the meaning of 18 U. S. C. 334, or that it is non-mailable within the provisions of that or any other statute, nor on the ground that plaintiff would not sustain irreparable damage if the order in question was wrongful and invalid.

2. That the copy of the so-called "supplementary recommendation" initialed by counsel is a true copy of a memorandum prepared by Walter Myers, Chairman of the Hearing Board, on or about November 22, 1943, and delivered by him to the office of the defendant, at defendant's suggestion.

3. That counsel for defendant will produce for plaintiff's inspection and at the trial, the files of certain magazines which have been admitted to second class mail privileges during the incumbency of the defendant as Postmaster General, which will be listed by plaintiff's counsel and will not exceed 50 in number.

1902 4. That defendant will produce for plaintiff's inspection and at the trial the available records of the Post Office Department with respect to denial or cancella-

tion of second class mailing privileges to publications on the ground that they did not meet the requirements of the fourth condition of 39 U. S. C. 226.

5. That a certified copy of auditor's statement showing profits, before and after taxes, realized from the magazine, Esquire, for the three fiscal years prior to said order, may be offered in evidence by plaintiff without formal proof as to foundation.

6. That this stipulation shall not prejudice the right of defendant to object to the admissibility in evidence of any of the foregoing items on the ground of materiality or relevancy.

Dated June 7th, 1944.

F. DICKINSON LETTS  
*Pretrial Justice.*

Attorneys authorized to act:

EDWARD M. CURRAN

FRANCIS M. SHEA

*Plaintiff.*

HOWARD BOYD

*Defendant.*

## II.

### PROCEEDINGS DESIGNATED.

1904

Washington, D. C.

Monday, July 10, 1944.

1995

Filed Oct 28 1944

*Excerpts from Opening Statements of Mr. Bromley on Behalf of Plaintiff and Mr. Demand on Behalf of Defendant and Colloquy of Counsel and Court. All in Connection with Proceedings Before District Court.*

Mr. Bromley: .....

\* There are before Your Honor some pleadings. There is a complaint by the magazine publisher, Esquire, Inc. It

alleges that the Postmaster General has misconstrued the statute, that his action is unlawful according to law, that his interpretation is not only contrary to the plain intent of Congress and all congressional committees who have considered the statute, but also contrary to the decisions of the courts, particularly the Court of Appeals of this District, and it is contrary to the established construction of the statute placed upon it by the Post Office Department for many years.

In its complaint the publisher seeks an injunction to prevent irreparable damage. The answer of the Department is a general denial first.

So therefore the issues to be tried here are: What is the proper construction of the fourth condition of the second-class statute? That is a question of law as to which no evidence is required and which I think should properly be considered upon final argument before Your Honor as a matter of law.

Second, I believe that the Supreme Court has consistently decided that it is important for any trial court to know something about the administrative determination or construction which has been placed upon a statute in question by the department charged with its enforcement.

1996 Thirdly, I suppose the issue is here, as in all injunction suits. Does this threatened injunction threaten irreparable damage to the plaintiff?

That has been stipulated out of the case because, in the pretrial order which I read to Your Honor, the Department has stipulated that it does not defend on the ground that plaintiff will not suffer irreparable damage.

I take it I need offer no proof on the issue of irreparable damage.

The answer of the Department, in addition to pleading a general denial, contains two affirmative defenses, each of which I believe raises only questions of law.

In the first place, the Government pleads that Your Honor has no power to review the order of the Postmaster General since it is alleged his determination involves an exercise of judgment and discretion and is therefore conclusive.

Of course, our answer to that is that the question is one of law and if an administrative official makes a mistake of law, of course any court has the right, the power, and the duty to review his action.

I find it somewhat surprising for the Postmaster General to assert this defense in the face of his repeated assertions in his order that he is making this decision against the magazine in order to compel the courts of this land fully and completely to review his action.

The second affirmative defense is a somewhat unique one in my experience. It pleads that the plaintiff comes into court with unclean hands because it is alleged that our magazine, while not obscene, has skirted close to the edge of obscenity, which the answer pleads is contrary to the purposes of the second-class statute as construed by 1997 Mr. Walker.

This defense is pleaded in spite of the fact, as I have repeatedly said, that the issue of obscenity has been stipulated out of the case and everybody agrees that the magazine is not obscene, is perfectlyailable and clean under the law.

Therefore, in this trial, as I see it, may it please Your Honor, the only item of evidence or proof which we shall seek to offer is on this single issue of what has been the administrative determination of this statute by the Post Office Department.

I think it is important to find out whether they have ever interpreted the statute this way before or not.

The Postmaster General claims the fourth condition of the statute about information and literature is ambiguous. I don't agree with that. It seems to me to be clear. It seems to me to entitle any magazine, so long as it does not



violate any statute and is mailable, no matter whether its contents are trashy or cheap or tawdry or bad literature or good literature, to these privileges, so long and only so long as it does not violate the criminal obscenity statute or the statute against subversive matter.

And there are many criminal statutes which make matter unmailable, such as treason. But everyone agrees this magazine is mailable and violates no statute whatsoever.

The Court: What is the title and section of the statute in question?

Mr. Bromley: 39 United States Code 224 and 226, sir.

Now, I feel that the Court should have the benefit of the defendant's long-established construction of this 1908 statute, and I propose to show, if permitted by Your

Honor, first, that there is a complete absence in its records of any instance where a Postmaster General has ever asserted the power or the right to pass upon the quality of the contents of a mailable magazine in applying this fourth condition. And secondly, I propose to show that this very defendant, Postmaster General Walker, in his Department, during his term of office, has had this very issue raised in the case of such magazines as this one I hold in my hand, the Police Gazette, where one of his hearing boards held that this publication, although a periodical, was so trashy as not to contribute to the public good.

One of his hearing boards found that very fact with respect to this magazine. One of the members of that board, Mr. Walter Myers, dissented. It came up for determination by the Third Assistant, and finally Mr. Walker himself, and he determined that he had no such power, that his magazine, being a periodical and meeting all conditions of the statute, was entitled to all these privileges, no matter what one might think as to the quality of its contents, but it nevertheless was literature; and that even though its pictures do not seem to be of the highest quality, the board found it did not violate the obscenity or any other statute and that it was mailable.

So I want to show by the records of the Post Office Department which I have subpoenaed here—and it won't take too long to do this—that the construction of the statute by Mr. Walker has been directly contrary to the construction he sought to put upon it in the Esquire case.

1999 And I would like to show further to Your Honor that there are now some 25,000 magazines which enjoy these privileges. And I want to show typical cases in which these privileges have been accorded to various types of magazines such as the comic magazines, that some of us try so hard to keep away from our children, little publications of pictures, so-called comic pictures, which are accorded the second-class privileges; the love and romance magazines, detective story magazines, the girl gag magazines, and the joke books are accorded these second-class privileges without any consideration being given to the contents.

This document I hold in my hand, "Exciting Comics," containing nothing but a lot of colored pictures for the amusement of our children, has the second-class privileges.

The Court: Pass it to the Court, please.

Mr. Bromley: Yes, sir. (Book handed to the Court.)

No Postmaster General has ever asserted that Congress intended him to pass upon the question of whether this stuff was worth while or whether it was not. Congress has said in effect in that fourth condition that anything that is a periodical which does not offend our criminal statutes, which is not obscene or treasonable, is entitled to second-class privileges.

There have been many debates about it and it has been studied, because it is an important problem. But everyone has arrived at the conclusion that this Nation could not with safety place in the hands of any one man or group of men the right to determine whether the contents of a magazine otherwise mailable were of such a character as to contribute or not contribute to the public good, and Con-

2000 gross has left the statute as it was, saying that any magazine otherwise mailable which did not offend our obscenity laws was entitled to go through the mail with second-class privileges.

So our contention is that Mr. Walker has committed an error of law, and it is the plain duty of any court before whom this matter comes, to enjoin his effort to bar our magazine.

Our magazine is in all respects comparable to the Saturday Evening Post and Ladies Home Journal. It is a magazine of general circulation and has been issued once each month, it has been issued for more than ten years. It is read by more than a million readers and has been so read for many years. It is a magazine which has a high literary content. (pp. 10-17)\*

Mr. Deinard: \* \* \* \* \*

The only contest between the publisher and the Post Office Department resulting in this lawsuit, is over this very simple question: Should the magazine be carried in the mails at second-class rates, or should it be carried at fourth-class rates? In other words, the sole question is the amount of postage which shall be paid by the publisher (p. 20)

By the act of 1879, which is still in effect, substantially unchanged, mail matter was divided and classified into four classes. \* \* \* \* \*

Under that classification the first class, as Your Honor no doubt knows, consists of letters, so defined by the statute.

The second class consists of so-called periodical publications; the third class consists of what is known in

\* Page references in connection with these excerpts are to stenographic transcript.

2001 the statute as miscellaneous printed matter; and the fourth class consists of merchandise, largely what is commonly known today as parcel post.

Those divisions, although they appear simple upon their face, are not of course of mechanical or automatic classification. It may sometimes be a question of nicety as to whether a particular packet belongs in the second class as a periodical publication, or in the third class as miscellaneous printed matter. It may be a fine question as to whether an article belongs in the first or fourth class.

For that reason authorization for administrative responsibility has been consigned to the Post Office by the Congress, which has for the past 65 years been charged with the responsibility of determining into what class a particular item of mail matter falls, and therefore what postage the sender shall pay for its carriage. (pp. 21-22) \* \* \*

When we get to the qualifying conditions to which a publication must conform in order to secure admission to second class, assuming it is already qualified as a periodical, those are the so-called four conditions for second class to which counsel has referred.

The \* \* \* fourth \* \* \* condition which is here important, is to the effect that it, referring to a periodical publication, must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, the arts, or some special industry, and having a legitimate list of subscribers. (p. 23) \* \* \* \* \*

The Court will observe that the fourth condition differs quite radically from the other three. It does not relate to the visible or physical characteristics of the periodical. It relates to its underlying purpose. And I point that out at this time because, no matter how cavalierly counsel may brush the fourth condition aside, the debates in Congress, the legislative history of the statute, the observations that were made by official commissions called upon to inquire into this, all clearly demonstrate one very obvious fact. When Congress granted the second-class

privilege, it gave to users of second class what amounts to a tax exemption, what amounts to a bounty, which President Taft in his message to Congress in 1912 referred to, and very properly, as a subvention. (p. 24) \* \* \* \*

That gets back to a fundamental and inescapable fact that, this subvention, this virtual tax exemption, was granted to users of the second-class mail not because of the physical characteristics of the mail matter. It had no relation to the cost of transmission of the mail. It was granted because Congress had concluded that it was in the public interest that the transmission which would contribute to public education, the dissemination of worth-while matter of some cultural value and of some educational value, be fostered by Congress.

I say that is one inescapable fact, and it is obvious, in view of the nature of the bounty.

Now, in this case Esquire magazine was cited and, as counsel has already mentioned, the actual proceeding before the Post Office Department was bottomed on two issues in litigation. One was the magazine obscene within the criminal statute which declares it a crime to mail obscene literature and which declares such matter nonmailable and

2003 directs the Postmaster not to receive it or carry it through the mails. The second issue was whether or

not Esquire was originated and published for the dissemination of information of a public character or devoted to literature, the sciences, the arts, or some special industry within the purview of the fourth section of section 226, which I call to Your Honor's attention, qualifying it for carriage at the nominal rate. (pp. 25-26) \* \* \* \*

The postmaster General \* \* \* concluded \* \* \* that regardless of the question of statutory obscenity, upon which he did not pass, that Esquire did not comply with the requirements of the fourth condition so as to qualify it for the nominal second-class rate. And he did so upon a finding that Esquire, as a systematic feature, or systematic and habitual feature, I believe is the wording of the order, de-

voted itself to girl gag cartoons, the Varga calendar of nude women, and to other items which he declined to regard as matters of public information or information of a public character, and which he declined to believe constituted a contribution to literature or to the arts.

In other words, the Postmaster General's order is bottomed on a finding made by him upon a very extensive record, that the real design of Esquire, its real devotion as contrasted with its professed devotion, does not relate to the benign purposes which Congress had in mind and which are enumerated in the fourth condition.

Therefore the issue that is presented before Your Honor is, I suppose, a narrow one. As counsel has pointed out, there is not a statutory review of the action of the Postmaster General. \* \* \* This is an independent proceeding in equity which challenges the Postmaster General's order on the ground that it is void, and it is not upon that 2004 ground that this action could be launched or successfully maintained.

Now, the rule with reference to judicial review or re-examination of an administrative order of this type, is a matter with which I know Your Honor is fully familiar. While there may be some variance in the expressions of the courts, there is no doubt about the fact that Your Honor is not setting up the case de novo, Your Honor is not, I am sure, going to undertake to supplement the authority of the Postmaster General.

The question, I take it, that we are going to try is: Is the Postmaster General's order so without the statutory authorization granted him that it constitutes a complete, willful, arbitrary or fraudulent exercise of administrative power.

In other words, is the record so devoid of support in the law or in the facts that a court can say that no responsible officer could have entered the order here challenged?

Now, that being the scope of the review, it is of course our position that the Postmaster General's order carries



with it a presumption of its correctness, even as to matters of law and their specific application to the construction of the statute, and that the findings of the Postmaster General with respect to the ultimate facts are final and conclusive in this proceeding. Or, at least let us say, are final if there is any evidence in the record to support them. (pp. 27-28)

Mr. Deinard: The Postmaster General did not say that the statute was ambiguous. Quite the contrary. He said the statute was crystal clear to him. He referred to 2005 its clear and common-sense meaning. He also stated in his order, what they all frankly admit, that there has been laxity with respect to the actual enforcement of this statute.

We shall frankly admit that other magazines have been accorded second-class privileges, which under this decision probably should not have second-class privileges. However, we challenge, and I think this is an appropriate time to raise the question, the right of plaintiff to produce here and offer proof as to administrative practice. (p. 33)

Therefore the ground of our motion to suppress raises precisely the question counsel raised, as to whether or not the Court will allow plaintiff in this case an opportunity to offer testimony as to what action the Post Office Department has taken with respect to other periodicals.

Now, of course, it is our position that no such testimony is competent. That is the reason I call to Your Honor's attention that this is not a judicial review, but an independent proceeding in which the Postmaster General's order is being challenged collaterally on the ground it is void.

There is no doubt under the decisions of the United States Supreme Court, that in any proceeding such as this, the validity of the Postmaster General's order must be determined from the record upon which he acted, and cannot be tested or challenged upon the basis of evidence offered to

the court which was not before the Postmaster General.  
(pp. 35-36)

Mr. Deinaud: \* \* \* altogether apart from the question of the jurisdictional matter raised as to the quantity of the record upon which this court acts, it is our position that what was done in other cases, or rather, what was not done in other cases, is purely collateral and throws no light upon the controversy.

It is quite clear from the decisions of the United States Supreme Court that in no event is proof of administrative so-called contemporaneous construction admissible unless the statute is ambiguous. (p. 37) \* \* \* \* \*

Now, obviously, no executive can annul a statutory grant of power to his department by declining to exercise it, and that is the most that counsel's proof, if offered, would show.

And as your Honor's question suggested, the Postmaster General's order on its face shows that the statute has not been regularly enforced. If that is all that counsel wants to show it appears ample from the statement of the Postmaster General which I read to the Court—(p. 38)

Mr. Deinaud: \* \* \* \* \*

I am perfectly willing to say to the Court that a number of other magazines which counsel thinks are of low quality, are still retaining their second-class privileges. Beyond that I don't know that we can go. \* \* \* \* \*

Furthermore, the mere fact that other publications of which counsel does not approve are still receiving second-class rates does not prove by any means that if the order here challenged stands, they are going to continue to receive second-class rates. It is certainly to the honor of the present incumbent of the office that he is willing to challenge practices which he does not regard as within the intention of Congress, and which his predecessors have through administrative laxity, lack of person-

nel or whatever it may be, permitted to travel at a bonny figure. (pp. 41-42)

Mr. Bromley: I proceed under a decision of the United States Supreme Court by way of analogy—there are many of them—but the decision of the Supreme Court in the case of *United States v. Chicago and North Shore Railroad Company*. There was a question as to whether a certain railroad was an interurban electric railway within the meaning of the section of the Interstate Commerce Act. If it was an interurban electric railway it was exempted from obtaining authority from the Interstate Commerce Commission and the Court had before it, and it is a question of interpreting the statute, whether it applied to this type of railroad, and the Supreme Court said:

“All doubt is removed by the application of the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons.”

It seems to me that if I can show your Honor that over the years this Post Office Department has never done anything else under this fourth condition except to look at the proffered magazine and say, “Is this a periodical or isn't it? If it is it doesn't make any difference what it contains; as a matter of right it is entitled to the second-class rates,” and that that is all the Department has ever done. . . . .

And I want to show that over the years any piece of paper which has been tendered to this Department 2008 and any reasonable man can look at it and say, “This is a magazine regardless of whether it is filled with this ridiculous trash and these silly jokes; but this is art, that is literature,” and if a little document called *Halt* has a legitimate list of subscribers it is a periodical, I want to show that the Government has never given any consideration such as Mr. Walker now gives to our magazine, to what is in it, and I think it will be of the

greatest help to show that he himself, as well as his predecessors, has admitted the privileges to all sorts of periodicals, and the only test ever applied is the question, "Is it a magazine?"

He himself has had that very question presented to him and he himself has ruled that the statute did not give him that power.

It seems to me to be of the greatest assistance in showing what the Post Office Department has done under this law. (pp. 43-45)

The Court: There is therefore a field here as to whether or not the Post Office Department is bound by the previous acts in this series of transactions, and if it is not bound then we don't see how the introduction of these other publications will be material in the case.

Mr. Bromley: I think every court that has had the question before it has felt that the Postmaster is bound by the action of his predecessors to the extent that if he construed a statute—if his predecessors consistently construed a statute in a certain way—that is an important argument for saying, "That is what the statute meant." (p. 47)

2009 Mr. Deimard: \* \* \* \* \*

Under the decisions of the Supreme Court there is no doubt about the fact that there is nothing in the nature of an estoppel. (p. 48)<sup>1</sup> \* \* \* \* \*

Here we have an independent proceeding with a collateral attack upon the order. The question of whether the order is void or not depends upon what evidence was presented to the Postmaster General and if counsel thought that there was any probative value in the record of the admissions of other publications, it was of course his duty to offer that testimony before the hearing board.

<sup>1</sup> The second of two pages of stenographic transcript, both of which are numbered page 48.

We have a complete record here and I don't see that it is competent or admissible, and to refer summarily to what has already been mentioned, I don't see how it can aid the Court.

Let's assume that the Court comes to the conclusion that the Government has been lax. I surely admit that. The Postmaster General admitted it in his order. I will say of record that if this order stands other publications which are now getting the second-class privilege will no longer get it. Upon that admission is there anything else which would be helpful to the Court? (pp. 50-51)

The Court: At present it would indicate that there would be involved in the Court's ruling a question as to whether or not the trial would be limited to the record as heretofore made in the hearing before the Postmaster General, or whether we would permit counsel to offer some additional evidence.

We will not limit the hearing exclusively to the record heretofore made, but will within the discretion of the Court admit other evidence, passing upon it as it may be offered. (p. 53)

1905 Thereupon,

**J. O. Bouton,**

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

*Direct Examination*

By MR. BROMLEY:

Q. Where do you live, Mr. Bouton? A. Washington, D. C. Do you want the specific address?

Q. You live in Washington? A. Yes, sir.

Q. What is your business, sir? A. I am superintendent of the Division of Newspaper and Periodical Mail under the Third Assistant Postmaster General of the Post Office Department.

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Q. Will you speak a little slower and louder, please?

A. I am superintendent of the Division of Newspaper and Periodical Mail in the Bureau of the Third Assistant Postmaster General, which is under the jurisdiction of the Postmaster General.

Q. For how long a time have you held that position?

A. Since January 1 of this year.

Q. Prior to that time you were with the Post Office Department? A. That is right.

Q. Tell us briefly how long and what the nature of your duties has been. A. I have been with the 1906 Post Office Department 26 years in round numbers.

My duties largely have been, that is, mainly, with the Classification Division, which was divided January 1, and they had to do with the classification of mail matter. Specifically and immediately my duties are with respect to newspapers and periodical publications entered as second-class matter in the mails.

Q. Is it a fact that the Department is referred to as the Classification Department? A. The Classification Division of the Third Assistant's Bureau, but now that has been divided into two or three divisions, and it is now the Division of Newspaper and Periodical Mail. When this action was instituted it was the Division of Classification.

Q. And it had been the Division of Classification for many years prior thereto, had it not? A. That is right.

Q. And it was the business of that division to determine which newspapers and periodicals were entitled to second-class privileges. Is that right? A. We gave consideration to that.

Q. That division was the division charged with the duty of determining that question, wasn't it? A. Subject, of course, to the general set-up of the Department.

Q. You mean the Chief of the Department, or, 1907 finally, the Postmaster General had the last word?

A. I suspect that would be right.

Q. But it was the duty of your department, subject to the approval of the Postmaster General, to make that determination, wasn't it? A. That is right.



Q. Isn't it a fact that over the 25 years or so you were there, that your department kept what is called precedent files? A. In general terms, yes, that is right.

Q. And you are familiar with those files, are you not? A. To a large extent.

Q. You have examined them in preparation for your testimony here, have you? A. No, I have not. I happen to know them pretty well. I have not examined them particularly for this.

Q. At any rate you are familiar with them? A. Yes, sir.

Q. And you are familiar with the grounds on which magazines have been ruled out under the fourth condition of the second-class statute, aren't you?

Mr. Deinard: You mean during his incumbency, counsel?

Mr. Bromley: During the 25 years he has been there.

The Witness: Yes, in particular cases, that is right.

By MR. BROMLEY:

Q. Can you show us from your recollection of your Department's practice, or from the files, a single instance where aailable periodical of general circulation has either had its second-class privileges revoked or refused on the ground of non-compliance with the fourth condition because the quality of its contents did not contribute to the public good and welfare?

Mr. Deinard: May I at this time, Your Honor, have my objection to any further testimony along this line, on the ground it is incompetent, irrelevant, and immaterial, no foundation has been laid, and more particularly that the question before the Court is up solely upon the administrative record, and on the ground there is no ambiguity in the statute which the Court is asked to construe, and no estoppel can run against the Government with respect to administrative interpretation, and there is no showing of any administrative order on any comparable periodical.

The Court: He may answer the question.

Mr. Bromley: Do you remember the question?

The Witness: Will you repeat it?

Mr. Bromley: The reporter will read it with the Court's permission.

(Pending question read as above recorded.)

1909 Mr. Deinard: May I add to that as a ground that the question in the latter part, which I had not noted, does not correctly relate to the Postmaster General's order and assumes facts not in evidence, that not being a specific ground on which the Postmaster General acted.

The ground was that the magazine was not originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry.

The Court: We have that finding before us.

Mr. Bromley: Have you forgotten the question again, sir?

The Witness: As to the latter part of the question I can show you cases where I can say we have dealt with the fourth condition. But right now I can't recall any that used that particular language.

It might be that it meant the same thing, but right now I don't remember any particular case.

The Court: Counsel, see if you can restate your question in a few sentences or a few words.

By MR. BROMLEY:

Q. Isn't it a fact that the Department has never given consideration to the question of whether or not the contents of a magazine contributed to the public good or welfare?

Mr. Deinard: May my objection stand, Your Honor?

The Court: You may have the benefit of your objection.

1910 The Witness: It must have some value, but I can't say that I have used the same language as you have used there.

By MR. BROMLEY:

Q. Isn't it a fact that you have never considered the quality of the contents of the mailable magazine from the standpoint of whether it made a special contribution to the public welfare? A. I have not considered any quality measure. I have considered the fourth condition, however.

Q. Certainly. What your Department does is to seek to identify a proffered magazine as to whether or not it is a periodical? A. Pursuant to an application for its admission.

Q. And you seek to determine whether or not it is a periodical in the commonly accepted sense of the term, don't you? A. That is part of the reasoning, yes, sir.

Q. And you make no investigation to determine the literary merit or the quality of the contents of the magazine, do you? A. Not with respect to the merit, but we do examine it as to whether it falls within that condition.

Q. I am trying to confine your answer to merit. You never make any investigation as to merit or worth-whileness of the material, do you? A. Indirectly we might  
1911 in arriving at the design or purpose of the publication. I don't believe I can answer your question yes or no in fairness to the proposition. We examine it to see the design and purpose of the publication.

Q. You mean you examine it to see whether the  
1912 information is public or private? A. Not exactly.

Q. That is one thing you have in mind? A. That is one thing.

Q. If there is submitted to you a paper published by my Episcopal Church in Brooklyn, devoted to our church affairs, the Department would not give that second-class would it? A. Wholly to your church affairs?

Q. Wholly to my church affairs. A. Not right off.

Q. Your idea is it is not public information? A. It does not fulfill the fourth condition.

Mr. Deinard: That isn't the exact wording.

By MR. BROMLEY:

Q. It is not information of a public character? A. It is not information of a public character. That would probably be the reason.

Q. When you said you gave consideration to the contents of a document, that is what you had in mind? A. That is right, and further the fourth condition.

Q. What other consideration do you give to the quality of the contents of a proffered periodical? A. We don't have a quality standard that this is good literature or bad literature, other than whether it is mailable, but we  
1913 have to consider as to whether it is such a periodical publication as comes within the whole statute.

Q. When you say you consider whether it is mailable or not, you mean— A. I didn't mean to say I did. That is the Solicitor's job. I meant to qualify my statement about good or bad. I didn't mean bad as to being unmailable. I meant as to a standard of merit, its worth.

Q. Since you have used the word, you know what "mailable" means, don't you? A. Using the different terms.

Q. There are a lot of criminal statutes which provide that certain kinds of materials like obscene material shall not only constitute crimes, but also provide that such material is not mailable? A. That would be a question for the Solicitor.

Q. When you used the word "mailable", you used it in that sense? A. That is right.

Q. And you say it is not part of your duty to determine whether a proffered article is mailable or not? A. We would say that is the type of publication that should go to the Solicitor's department as to ruling on that feature.

Q. So your duty is limited to identifying as to  
1914 whether a proffered article is a magazine or not under the second-class— A. That is a fair statement.

Q. And you pay no attention to the quality of its contents except in so far as the question of contents bears upon

identification. Isn't that right? A. I suspect that is about right. I don't say that we weigh the worth of that literature, if that is what you mean.

Q. Now then, isn't it a fact, Mr. Bouton, that there is no evidence in your files which shows that your predecessor did other than follow that course, 'way back to the beginning of the Department? A. I think that is right.

Q. Now, you are familiar with the granting of second-class privileges to various types of magazines, aren't you? A. That is right.

Mr. Bromley: May I have marked for identification, if Your Honor please, what purports to be a magazine called Gags dated July?

The Court: It may be marked.

(The document referred to was marked as Plaintiff's Exhibit No. 1, for identification.)

By MR. BROMLEY:

Q. Will you look at Plaintiff's Exhibit No. 1 and tell me whether that is a periodical which has received the 1915 second-class privileges under the Second-Class Law and especially under the fourth condition?

Mr. Deimard: We object to that question on the grounds already mentioned and on the ground that the witness, by virtue of the position he occupies cannot commit the Department and his superiors to any view or opinion he might venture, and on the additional ground that it appears that the exhibit marked for identification and tendered to the witness is a July issue, in other words, issued after the proceeding before the Post Office Department was closed and after the Postmaster General's order was made and, therefore, after the commencement of this proceeding and, therefore, could not affect the order of the Postmaster General which is challenged in this proceeding.

The Court: I overrule the objection.

Mr. Bromley: Do you have the question in mind?

The Witness: Yes sir, I have the question in mind.

By MR. BROMLEY:

Q. How do you answer it? A. Off the record I would like to say—

Mr. Bromley: (Interposing) I object to any statements off the record. He wants to say something off the record.

The Witness: Ordinarily we don't discuss another person's publication, and to answer this question I would have to —

The Court: What we understood counsel is seeking to elicit is this in part: If that document or that publication that you hold was presented to you for classification as second-class mailing matter, what would you do in determining and passing upon the application and how would you arrive at a determination of the matter?

The Witness: That is what I was going to say, that this particular publication is under study now and, while I don't like to say what the Department is doing —

Mr. Deinaud: (Interposing) If it is under investigation or scrutiny now, I suggest this is not an appropriate example to proffer to the witness.

The Court: We think the question contemplates what has been the practice through the time since he has been in there. Go ahead.

The Witness: This publication is under study now. As my recollection from one of many, it is that it has had a second-class entry.

By MR. BROMLEY:

Q. When did it get it, sir? A. I was going to finish. This particular publication we have here does not have an entry at this time at the place sought.

Q. At what? A. At the place sought for entry, and that is being given consideration.



This publication has applied for re-entry as second-class matter.

Q. Won't you look at the appropriate place and see if it does not say it is second-class? A. It has not been entered as second-class at the place sought.

Q. Doesn't that magazine have second-class privileges? A. It is so accepted under the provisions of the laws and regulations pending action on the request for re-entry.

Q. Hasn't it had second-class privileges for many years? A. I wouldn't say for how many years. It has had second-class entry. It is now being considered on a re-entry basis.

Q. Will you look at your file and tell me when it got second-class privileges? A. The file is in the large boxes, I believe.

Q. Will you have somebody get it out and look at it, please?

What is the date, sir?

A. Yes, sir. I find it was entered as second-class matter August 15, 1941.

Q. At that time was the then-current issue submitted to your office for examination? A. The current issue with the application was submitted.

Q. Yes. It was submitted? A. That is right.

Q. And was examined? A. Yes, sir.

1918 Q. Is that issue which was submitted in connection with the application of Gags for second-class privileges in your file? A. I will have to determine.

Q. Will you look? A. Yes, sir, I will. Yes, sir, I believe it is.

Q. It is the issue dated what? A. May 1941.

1919 Mr. Bromley: May I have that marked for identification if Your Honor please, as Plaintiff's Exhibit 2 for identification?

The Court: It will be so marked.

(The document referred to was marked Plaintiff's Exhibit 2 for identification.)

Mr. Bromley: I offer in evidence Plaintiff's Exhibits for identification 1 and 2.

Mr. Deindard: They are objected to on the ground that they are irrelevant, incompetent, and immaterial, no foundation laid, no probative value in the case, and they neither tend to prove or disprove the validity of the Postmaster General's order.

The complaint alleges, and the answer admits, that there are 25,000 publications that are presently admitted to second-class. That doesn't take count of the publications that have not been admitted.

I submit to Your Honor that it is wholly impractical for the Court to conduct an inquisition into the practices of the Post Office Department on a comparative basis.

The Court: We get your theory of the case. They are received.

(Plaintiff's Exhibits 1 and 2 were received in evidence.)

By Mr. Bromley:

Q. Are you familiar with a publication known as Hit?

A. I know the name. I would have to have the file before I would know much about it. I know the name.

Q. Do you know whether or not it was admitted to second-class privileges sometime in the past? A. Without looking at the file I think it was, but I would have to have the file on that.

Q. Will you get the file, please? The magazine Hit was granted second-class privileges on September 15, 1943, wasn't it? A. It was reentered as second-class matter on November 15, 1943.

Q. And it was granted as of January 18, 1943, wasn't it? A. Originally entered September 15, 1943, as of January 18, 1943. The reentry was dated -- you are speaking of the original entry?

Q. Yes. A. That is right.

Q. What issue was it, that was examined by the Post Office Department on the basis of which the second-class

privileges were accorded to the magazine *Halt*? A. This publication has a considerable story to it.

1921. Q. Can't you answer that question? It was the November issue, wasn't it? A. I can give you that in just a minute.

Q. Wasn't it the November issue? A. Just a minute. November, 1943.

Q. And that issue is in the file, isn't it? A. It should be. I will see. That issue is in the files.

Mr. Bromley: I ask that it be marked as Plaintiff's Exhibit 3 for identification.

The Court: It may be marked.

(The document referred to was marked Plaintiff's Exhibit 3 for identification.)

The Witness: Both of these publications were studied by the Solicitor's Office, I might say.

Mr. Bromley: I offer Plaintiff's Exhibit 3 for identification, in evidence.

Mr. Deinard: We object to the receipt of Plaintiff's Exhibit 3 on the ground that it is incompetent, irrelevant, and immaterial, and no foundation laid.

The Court: That will be overruled for the present.

(Plaintiff's Exhibit No. 3 was received in evidence.)

Mr. Bromley: Will Your Honor take a look at that 1922 exhibit, if you please?

(Exhibit 3 was handed to the Court.)

By Mr. BROMLEY:

Q. Will you look at your file on the magazine *Halt*, please? A. I didn't understand you.

Q. Will you look at your file on the magazine *Halt*? When was the magazine *Halt* given second-class privileges? It was in January 1942, wasn't it, Mr. Bouton? A. I just wanted to make certain. After study and reference to the Solicitor it was admitted January 1942 as of October 27, 1941.

Q. And this admission to second-class privileges was made after inspection of the January 1942 issue by the Department, wasn't it? A. That is right.

Q. Will you produce the January 1942 issue, please? A. I have it here.

Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit 4, if the Court please.

Mr. Deinard: We object to that as incompetent, irrelevant, and immaterial, if the Court please.

The Court: The objection is overruled.

(The document referred to was marked Plaintiff's Exhibit 4 and received in evidence.)

1923 Mr. Bromley: Will you show it to the Court, please.

(Plaintiff's Exhibit 4 was handed to the Court.)

By Mr. Bromley:

Q. Will you get your file on Hello Buddies, please? Second-class entry was granted to the magazine Hello Buddies as of January 14, 1942, was it not? A. After having been referred to the Solicitor's Office for advice, it was admitted as second-class matter on March 13, 1942, as of January 20, 1942.

Q. And the copy submitted for your examination and examined by the Department, was the April 1942 issue, was it? A. I believe the March 1942 issue, Mr. Bromley.

Q. Will you produce the March 1942 issue, please? A. I have it here.

Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit 5.

Mr. Deinard: To which offer the defendant objects on the ground that the exhibit is incompetent, immaterial, and irrelevant.

The Court: Overruled.

(The document referred to was marked Plaintiff's Exhibit No. 5 and received in evidence.)

By MR. BROMLEY:

Q. Will you get your copy of Army and Navy Fun Parade?

1924 The Court: How many of these publications do you desire to offer, counsel?

Mr. Bromley: I should think half a dozen.

The Court: This is five.

Mr. Bromley: It will be four because I have two of one kind. I would like permission to offer about five more, if I may.

The Court: If you have a copy of the plaintiff's publication, we would like to have it also.

Mr. Bromley: Yes, Your Honor. There were eleven issues. I show Your Honor the February 1943 issue. I have all eleven if Your Honor would like them, but they are all substantially the same.

(February 1943 issue of "Esquire" was handed to the Court.)

Mr. Deinard: May I suggest that you give to the Court the January 1943 issue?

Mr. Bromley: Certainly, any issue you want.

The Court: We will be glad to look at them both.

By MR. BROMLEY:

Q. The magazine Army and Navy Fun Parade was granted second-class entry on January 7, 1942, wasn't it?

A. That was not the exact title of it then. The title then was Fun Parade, if that has any significance. That publication, under the title Fun Parade, after a ruling on

1925 it by the Solicitor's Office, was entered as second-class matter on January 7, 1942, as of November 19, 1941.

Q. And these privileges were given on the basis of an inspection of the January issue? A. The January issue.

Q. Will you produce it, please? A. 1942. I have it here.

Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit No. 6.

Mr. Deinard: To which the defendant objects as being immaterial, irrelevant, and incompetent.

The Court: Same ruling.

(The document referred to was marked Plaintiff's Exhibit No. 6 and received in evidence.)

By Mr. BROMLEY:

Q. Will you get your file on Comic Cavalcade? The magazine Comic Cavalcade received second class privileges November 13, 1942, didn't it? A. This publication was entered as second-class matter under date of May 4, 1943, as of November 13, 1942.

Q. On the basis of the issue for the spring of 1943, was it not? A. That is right.

Q. Will you produce it, please? A. I have it here.  
1926 Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit No. 7.

Mr. Deinard: To which the defendant objects as incompetent, irrelevant, and immaterial.

The Court: Same ruling.

(The document referred to was marked Plaintiff's Exhibit No. 7 and received in evidence.)

Mr. Bromley: Would Your Honor look at this Exhibit 7, please, for a moment?

By Mr. BROMLEY:

Q. Plaintiff's Exhibit 7 is what is sometimes referred to as a joke book, is it not? A. I would like to see it again.

Q. You have one before you. A. No, I have not - oh, here it is.

Q. I withdraw that question.

Plaintiff's Exhibit 7 is what is usually referred to as a comic magazine, isn't it? A. A so-called comic, yes, sir.

Q. The Department has uniformly granted second-class privileges to hundreds of such magazines over the past several years?



Mr. Deinard: The defendant objects to that. There is no foundation laid and it is not the best evidence of the records of the Department.

Mr. Bromley: If I produced those, you wouldn't like that.

The Court: You are making a different objection. You might elaborate a little on that.

Mr. Deinard: At this point counsel is inquiring of the witness on the basis of one sample which has not been testified to as a representative sample. On the basis of that he proposes to ask the witness whether the Department has not uniformly granted second-class entry to comic magazines. That calls for a conclusion of the witness as to records which are not produced, and by virtue of his office he is not authorized to commit the Department as to his personal view of what the official practice of the Department has been.

The Court: We inferred the question to mean as to whether or not the privilege had been continuously granted. If there is any special purpose in the question other than that, we will hear from you on it, counsel.

Mr. Bromley: I meant by the question, sir, to ask if this magazine was not typical of a lot of other comics which had received these privileges. Rather than to go into each one of the comics which received these privileges, I wanted to ask if this was not typical of many, many magazines which have been granted the privilege.

The Court: He may answer.

1928 The Witness: Each magazine must be individually considered, on its own merits, as it comes in. I don't believe I can just say it is typical.

1929 Further, my own position in the matter probably should require a little different answer than "yes" or "no."

Q: Second-class privileges have been extended to many comic magazines, have they? A: The so-called comic magazines, some of them have received second-class entry after they have met certain conditions.

Q. Isn't it—

Mr. Deinaud: You have not finished, have you?

The Witness: It represents, you might say, an innovation in the presentation of stories. If you want me to expand further—

By MR. BROMLEY:

Q. I just want you to tell me— A. They are entered under certain conditions.

Q. Many of them? A. Several of them.

Q. There are dozens of them, aren't there? A. That would include dozens. Maybe a hundred or more. Each one is considered on their own merits.

Q. But they are all about alike in that they have series of comic cartoons? A. Well, they tell a story in pictures and after certain other conditions are met you have to consider

that. If you want me to explain a little bit how you 1930 do it—I am answering "yes" or "no" on these questions as to whether they are admitted without giving the reason for it.

Q. Each of these magazines contains not over two pages of textual matter? A. I wouldn't say that.

Q. As a minimum? A. I wouldn't say that. They usually tell their story in pictures.

Q. Do they have textual matter? A. I am coming to that.

Q. Can't you tell me whether or not they have textual matter? A. Indeed they do.

Q. That is what I wanted to know. A. They have a reasonable amount of textual matter.

Q. You also grant second-class privileges to detective magazines, don't you? A. If they meet the conditions, yes, sir.

Q. And you grant them to love and romance magazines, don't you? A. You are using a general term. Those magazines with love stories in them are entered if available, yes.

Q. You are familiar with the publication The Police

Gazette, are you not? A. To a certain extent, yes, sir.  
 1931 Q. Will you get out your file on that publication, please? A. It is National Police Gazette, to make your records exact.

The Court: After the presentation of the next exhibit, counsel, the Court will proceed to recess.

The Witness: I have the file here, counsel.

By MR. BROMLEY:

Q. Will you produce, please, the order to show cause dated January 9, 1943? A. I have located it, Mr. Bromley.

Mr. Bromley: I offer it in evidence.

Mr. Deinard: As I understand it, the offer is directed to an order to show cause issued in that proceeding.

Mr. Bromley: Yes.

Mr. Deinard: To which the defendant objects on the ground it is an attempt to inquire collaterally into another and entirely unrelated periodical. This I conceive is on a different basis than exhibiting to Your Honor a type of periodical which is claimed to currently enjoy second class privileges.

Now counsel is attempting to explore the proceedings of the Post Office against another periodical.

The Court: I will hear from counsel on the materiality and relevancy.

Mr. Bromley: I have three instances, may it please Your Honor, in which the Postmaster General's Department  
 1932 cited magazines like the Police Gazette on applications for restoration of their second-class privileges, in which the proceeding was brought on the ground that the contents of these magazines did not constitute public information or literature or art.

The matter in each instance was litigated in the Department. The final result of each was that the Postmaster General concluded that the statute did not give him any power with respect to passing upon the contents of the magazine, and after the litigation the magazines were admitted by him to second-class privileges.

This item of evidence having to do with these three magazines constitutes administrative interpretation of the statute by this Department in situations where the precise question was litigated and decided by him. It seems to me that they are examples of administrative interpretation of the greatest value because they were done after careful consideration.

The Court: You offer them as showing administrative practices?

Mr. Bromley: Yes, sir.

The Court: I don't think the Court would be bound by them, but I don't think it would prevent the Postmaster General from acting differently after further consideration. Even the Supreme Court can change its theory, you know.

Mr. Bromley: And it sometimes does.

1933 The Court: I believe we will let you offer them.

Mr. Bromley: May the order to show cause, then, be marked as Plaintiff's Exhibit No. 8?

The Witness: Shall I leave it in the file?

Mr. Bromley: Leave it in the file. I don't think we need disturb your file, sir.

The Court: It may be marked.

(The document referred to was marked as Plaintiff's Exhibit No. 8, for identification.)

1934 Washington, D. C.

Tuesday, July 11, 1944.

1935 Mr. Bromley: Although I think it was received in evidence, the record does not show that Plaintiff's Exhibit 8, the Order To Show Cause, of June 9, 1943, was received. I therefore now offer it in evidence.

Mr. Deinard: I assume that the record shows our objection—or does it, Mr. Bromley? If not, I should like the record to show that we object on the grounds already indi-

cated, that the order is incompetent, irrelevant, and immaterial.

The Court: It will be received.

(Plaintiff's Exhibit No. 8 was received in evidence.)

By Mr. BROMLEY:

Q. Will you produce from your file, Mr. Bouton, the majority opinion of the Hearing Board in the Police Gazette case, dated August 2, 1943? A. Did you read the date, Mr. Bromley?

Q. August 2, 1943? A: I have it.

1936 Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit No. 9.

Mr. Deindard: Now, I don't want to tire Your Honor with objections, but I should like to point out in support of our objection that this is incompetent, irrelevant, and immaterial, that this stands on a different basis than the items of periodicals which counsel was permitted to offer yesterday, I assume as illustrative matter. This relates to recommendations of a Hearing Board appointed to consider an application for reentry of the National Police Gazette. That hearing was held under a different provision than the hearing held by the Postmaster General in this case.

You see, the statute which we mentioned, section 232 of the Code, provides in substance that before a permit for second-class matter is revoked, that there must be a hearing. It does not prescribe the form of hearing, but by the departmental rules of practice the Postmaster General has prescribed the form of hearing, which was followed in this case, namely, a Hearing Board which listens to the testimony and returns the transcript, together with recommendations. There is no statutory provision for a hearing upon applications for second-class entry, nor for hearing upon application for reentry after cancellation.

1937 Those hearings are governed by the provision of a regulation which is known as section 531 of the Postal Laws and Regulations, which provides that:

"When an application for the entry of a publication as second-class matter is made after its second-class privilege under a previous entry has been revoked, upon citation and a hearing held pursuant to the provisions of section 536, the applicant, after offering for mailing four consecutive issues of his publication, shall be given an opportunity to be heard at a public hearing before a board of postal officials designated by the Postmaster General upon the question of whether his application shall be granted, and the Third Assistant Postmaster General shall follow the recommendation of the Hearing Board in considering the application."

Now, that provision is unique in two respects. First of all—well, may I withdraw that statement?

For the present purposes the proceeding is entirely different from the proceeding here, because here an order was made by the Postmaster General and it is his action that is being challenged. The action which was to follow the hearing before the Hearing Board in the National Police Gazette case was an order of the Third Assistant Postmaster General.

Now, all that, I take it, counsel can hope to gain by offering these reports is to indicate what various individual opinions of various people may have been upon this subject.

It certainly does not represent any official action by the Department, not even by the Third Assistant Postmaster General, and even if it represented the opinion of the Third Assistant Postmaster General, how could that in any way reflect the official opinion of the Department or the opinion of the Postmaster General?

Now, I take it that if this Court were acting in an appellate capacity over the decision of a trial court, the Court would not receive in evidence or care to inform itself as to all of the decisions and opinions of the trial court in other cases. That is the most that we have here, because it is purely a collateral undertaking; but it is not only a collateral suit, it also involves the decision or judgment of



another official, not the official whose action is being challenged here.

Now, I suggest the objection not because we have any desire to keep from the Court what the various opinions of various Postmasters General or their subordinates may be, but simply because we feel it will confuse the record and do no one any good.

The Court: Does counsel want to be heard on the matter?

Mr. Bromley: May it please Your Honor, this chain of proof, of which this document is merely one step, will show official and final action taken by the Post Office Department, and one of the documents in there I think will show that the

Third Assistant, under the law entrusted with making the decision, put this up to the Postmaster General himself, so important was it considered.

So that I think it is clearly admissible, first as an official action of the Post Office Department, and second as a matter which went to the Postmaster General himself. The action of the Department in determining this matter involved a construction of the fourth condition of the second class mailing statute, the very section before us, and I think this file will show that the construction placed upon the statute was not that alone of the Third Assistant but was approved by the Postmaster General himself. I don't think that makes any particular difference, since it was the Department's action.

Mr. Deinard: Well, perhaps counsel has other information than I have, but do you claim that in this connection, with respect to the National Police Gazette, that any order or decision was entered by the Postmaster General?

Mr. Bromley: I claim that the Third Assistant wrote a memorandum to the Postmaster General recommending the course of action which was thereafter taken.

Mr. Deinard: Well, but that is not responsive. So far as I know—this is my information and I believe it is correct—that in the matter under consideration the order that was entered was an order of the Third Assistant Postmaster General, to whom is committed the duty—

1940 The Court: As we understand you, it is on an application of reinstatement rather than exclusion of a publication.

Mr. Dequard: That is correct. I mean, the Postmaster General takes no action in such a proceeding, and took no action in this case. I understand counsel to claim that there was some informal discussion, but I am sure that counsel does not claim that there was any official action taken by the defendant in that case.

The Court: Because of the very far-reaching effect of the action of the Postmaster General if his action was finally sustained, we are inclined to leave the gates fairly wide open so as to consider everything that might have a bearing upon the case, even though in this particular instance we do not see any probative value in the matter, unless it be to show that the Department over which the Postmaster General presides does conduct a quasi-judicial hearing and that he has treated with the Police Gazette, which is a magazine, we will say, of a similar character. Although it may have been excluded, his Department has extended to it a second hearing and presumably reinstated it.

Now, by way of analogy and argument, at least, that might indicate to the Court that there has been a fixed policy of the Postal Department that might be overruled by the Court or by the Postmaster himself. The Postmaster has the right to reverse himself and, therefore, strictly speaking it would not be necessarily relevant or carry with 1941 it any great probative force. But before any position of long standing is overturned we feel that there should be a full hearing.

Mr. Bromley: May it be marked then as Plaintiff's Exhibit No. 9, please?

(The document referred to was marked Plaintiff's Exhibit No. 9 and received in evidence.)

By MR. BROMLEY:

Q. Now, will you produce from your file the two minority opinions filed by Fourth Assistant Postmaster General Myers, a member of the Hearing Board in this matter?

A. In this same case?

Q. In the same case. A. I have it.

Q. And will you give me the date of the earliest one, please? A. I don't think it bears a date.

Q. Will you produce the first one in your file, please, and I offer it in evidence as Plaintiff's Exhibit 10. A. They are annexed together here.

Q. Are they in one document? A. No, two separate documents.

Mr. Bromley: I offer the first one as Plaintiff's Exhibit 10.

Mr. Deinard: Might we have the same objection to that, Your Honor?

The Court: It will be admitted for the reasons stated.

(The document referred to was marked Plaintiff's Exhibit No. 10 and received in evidence.)

Mr. Bromley: And I offer the next one, which I believe is dated August 4, 1943, as Plaintiff's Exhibit 11.

Mr. Deinard: Same objection.

The Court: Same ruling.

(The document referred to was marked Plaintiff's Exhibit No. 11 and received in evidence.)

By MR. BROMLEY:

Q. In connection with this matter there is in your file, isn't there, Mr. Bouton, a memorandum from the Third Assistant Postmaster General, Mr. Black, to the Postmaster General himself, dated August 5, 1943? A. There is.

Q. Will you produce it, please? A. Yes.

Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit 12.

Mr. Deinard: I wonder if I might see that, Your Honor. I don't think I have ever seen that document.

The Court: Yes.

Mr. Deinard: Might I inquire of the witness, Your Honor, as a basis for an objection?

The Court: Yes.

By MR. DEINARD:

Q Mr. Bouton, as I understand it, you have given counsel access to these files? A. That is right.

Q. And what you have produced here is the official file of the Department? A. Yes, sir.

Q. Now, with respect to this memorandum which has been called to your attention, of August 5, 1943, I will ask you whether or not that is all purely departmental memoranda, that is, a memorandum purely for departmental purposes, which was never issued as an order, published or given to the applicant in any way?

Mr. Bromley: I object to that question as immaterial; the document speaks for itself.

The Court: It would so appear to the Court.

Mr. Deinard: Let me ask you this:

By MR. DEINARD:

Q. From an examination of your files, does that memorandum to which counsel has called your attention constitute either a part of the recommendations of the members of the Hearing Board or a part of the order of the Third Assistant Postmaster General?

Mr. Bromley: I think that is immaterial. Again, it speaks for itself.

The Court: I think so, but we will permit him to answer the question.

The Witness: It is neither.

Mr. Deinard: Well, I wish to add to our objection that this is purely a private, confidential, departmental communication between the Third Assistant Postmaster General and the Postmaster General, does not constitute either a part of the recommendations of the Hearing Board or of the Third Assistant's order, and therefore is wholly incompetent.

The Court: We do not see how the Postmaster would be bound by any correspondence of his Department and we don't know just how the paper is relevant. We will hear from counsel.

Mr. Bromley: This is a memorandum from the Third Assistant Postmaster General who, under the law, is entrusted with making the decision as to whether this publication should have second-class privileges or not. After he got the majority opinion and the minority opinion of his Hearing Board disagreeing on the interpretation of the fourth condition, and before he determined the matter himself, he put it up to Mr. Walker, the Postmaster General, explained the whole thing to him, what the question was, so important was it, and following the submission of his memorandum, an official memorandum, in the file, to the Postmaster General, this publication was given second-class privileges.

Mr. Deinard: Well, if counsel proposes to follow this by showing that there was an order, direction, or instruction in the file elsewhere from the defendant here, the Postmaster General, to his subordinate, then I can see that this would be preliminary to a point which would be relevant, but I gathered from him that he is offering this simply as an isolated instrument indicating that the Third Assistant Postmaster General called it to the attention of his superior.

The Court: We would be inclined to admit not only the findings of the Postmaster General but also the opinion of the board that heard the controversy. If that is a part of this, you may offer it.

Mr. Bromley: I believe it to be, sir. I therefore offer Exhibit 12.

Mr. Deinard: I object to it on the ground that the record shows the contrary from the answer of the witness.

The Court: All right. We will let it be admitted and if we find it has no relevancy, why, we will strike it.

(The document referred to was marked Plaintiff's Exhibit 12 and received in evidence.)

By Mr. BROMLEY:

Q. Mr. Bouton, subsequent to the date of Exhibit 1946 12, and on August 24, 1943, an order was entered granting second-class privileges to the magazine National Police Gazette, was it not? A. It was.

Q. And do you have in your file a copy of the issue of the National Police Gazette which was examined by the Department as a part of its action in granting second-class privileges to that magazine? A. I might say that a number of issues were examined before that was entered.

Q. Can you tell us what issues were examined? A. It would take quite some time to trace those down here.

Q. Can you produce one issue that was examined? A. I can produce the August 1943 issue, yes, sir.

Q. You have in your hand the August 1943 issue? A. I have it.

Q. Isn't it a fact that the order granting second-class privileges or entry to this magazine recites that the August 1943 issue was examined by the Department? A. It does. It indicates other issues were examined too.

Mr. Bromley: I offer the August 1943 issue of 1947 the National Police Gazette in evidence.

Mr. Deinard: Objected to as incompetent, irrelevant, and immaterial.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 13 and received in evidence.)



By MR. BROMLEY:

Q. Will you produce your file on the magazine Hobo News, please? A. Yes.

Q. Will you produce, please, an order to show cause in the Hobo News file, dated June 12, 1943? A. I have it.

Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit 14.

Mr. Deinard: Same objection.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 14 and received in evidence.)

By MR. BROMLEY:

Q. Will you produce the majority opinion of the Hearing Board in the Hobo News case, dated July 10, 1943, please? A. July 10, 1943.

Q. July 10. A. I have it.

1948 Q. There is endorsed at the foot of that opinion the dissent by the dissenting member, is there not? A. There is.

Mr. Bromley: I offer the document dated July 10, 1943, as Plaintiff's Exhibit 15.

Mr. Deinard: Same objection.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 15 and received in evidence.)

By MR. BROMLEY:

Q. There is in the file a memorandum from the Third Assistant Postmaster General to Postmaster General Walker, dated July 15, 1943, isn't there? A. From the Acting Third Assistant Postmaster General, dated July 15, 1943.

Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit 16.

Mr. Deinard: And to that exhibit we make the same objection as to Plaintiff's Exhibit 12, on the ground that not only is the exhibit incompetent, irrelevant, and immaterial for the reasons suggested in the response to the offer of sample magazines, but also on the ground that it is incompetent

because it constitutes merely an internal administrative document and does not purport to be either a part of the recommendations of the Hearing Board nor a part of the order entered by the Third Assistant Postmaster General.

The Court: Mr. Attorney General, we are not saying that you are not right in your objection. We are in a measure carrying all this along in order to pass on the case. You see, in this case the magazine is, you might say, on trial for its life, and in a case of that kind we feel the case should be left open in order to bring forward for the Court's inspection anything that in the mind of counsel, counsel equipped and learned in the law, desires the Court to consider, and we are going to be liberal in leaving the gates open.

Mr. Bromley: May that be marked as Plaintiff's Exhibit 16, please?

(The document referred to was marked Plaintiff's Exhibit No. 16 and received in evidence.)

By MR. BROMLEY:

Q. Will you produce, please, a handwritten memorandum dated July 20, 1943? A. I believe I will have to have a little further explanation. From whom?

Q. I refer to a memorandum which you have before you, in the handwriting of Assistant Solicitor Hassell, to "Judge." You see that? A. I can't identify the handwriting but I think I have here what you have in mind.

Q. Who is "Judge" referred to in that? A. I couldn't say.

Q. Don't you know, Mr. Bouton, that that is Vincent Miles, the Solicitor of the Post Office Department? A. That is my opinion.

Q. And who is "the boss" referred to in the memorandum? A. I don't know.

Q. Don't you know that that is Postmaster General Walker?

Mr. Deinard: Just a moment. I submit, Your Honor, that this goes beyond the realm of fair examination, to ask this witness to guess as to nicknames used by a third person in a memorandum not addressed to him.

The Court: The witness is supposed to be from the enemy's camp. We feel that the objection should be sustained.

By MR. BROMLEY:

Q. Can you identify the handwriting as that of Assistant Solicitor Hassell? A. No, sir, I cannot.

Q. Didn't you just say a minute ago that you could? A. No, I believe I said I couldn't.

Q. What initials appear in the memorandum?  
1951 A. I can make out two of them. It looks like it is "C. H."

Q. What are Hassell's initials? A. I don't know his full initials.

Q. Don't you know? A. I believe it is "C. A. H."

Q. "C. A. H."? A. Yes, but I don't know definitely.

Mr. Bromley: I offer this memorandum in evidence.

Mr. Deinard: Might I see it, Your Honor?

The Court: Yes.

Mr. Deinard: Might I ask him a question, if the Court please?

The Court: Go ahead.

By MR. DEINARD:

Q. Mr. Bouton, this little slip of paper to which counsel called your attention refers to Solicitor — I take it that this is stationery from the Solicitor's Office, is it? A. That is what I would judge, yes.

Q. Are you a member of the Solicitor's Office? A. I am not.

Q. Do you have any connection with the Solicitor's Office?

A. None whatever.

Q. Are any members of the Solicitor's Office responsible to you administratively? A. No, sir.

Q. Or you to them? A. No, sir.

Mr. Deinard: I object to this on the ground that it is incompetent, irrelevant, immaterial, and no foundation laid.

The Court: Is it the little penciled memorandum in red pencil?

Mr. Bromley: Yes, Your Honor.

The Court: I sustain the objection.

Mr. Bromley: Now I ask counsel for the Government to concede that this is a memorandum in Mr. Hassell's handwriting which was sent to the Postmaster General. I call his attention to the fact that there sits on his left Mr. O'Brien, of the Solicitor's Office, who is entirely familiar with all the facts.

Mr. Deinard: I am sorry, Your Honor, I have never seen this little slip of paper before. It certainly in my opinion does not rise to the dignity of an official memorandum. I am unable to accommodate counsel by agreeing who is the writer of it because I haven't the remotest notion.

The Court: If the paper were actually signed by the official counsel supposes was the author of it, then how would it be relevant?

Mr. Bromley: Merely to show that the action of the Post Office Department was called specifically to the attention of the Postmaster General who approved it.

The Court: It goes no further than to show that he had counsel in passing upon the controversy?

Mr. Bromley: I think it goes one step further, sir, and shows that counsel referred the matter to him and that he knew about it.

Mr. Deinard: Mr. Bromley, does that memorandum purport to state that he has seen the Postmaster General? I think you are misinformed.

Mr. Bromley: No. All it says is that Mr. Walker wants to see the letter before it goes out.

Mr. Deinard: You don't claim that that is proof of the fact that the document ever was submitted to the Postmaster General or seen by him?

Mr. Bromley: I can only take one step at a time. I am asking first whether this memorandum was not written by Mr. Hassell.

Mr. Deinard: I am sorry, I just don't know.

The Court: Unless you can enlighten the Court as to some probative value that is of a relevant character, we don't believe it relevant. In other words, we don't just see your reason for offering it. You might tell us a little further. We will ask you to stop here and tell us why this is a pertinent matter and enters into the controversy.

Mr. Bromley: Yes, sir. In order to do that I  
1954 would like the file, please.

May it please Your Honor, Exhibit No. 14 is an order to show cause, issued by the Post Office Department to this magazine, the Hobo News, notifying it that it will be granted a hearing in connection with its application to be admitted to second-class privileges, and the order to show cause says to the Hobo News the Post Office Department is citing you to a hearing to show cause why your application should not be denied on the ground that the Hobo News is not originated and published for the dissemination of information of a public character or devoted to literature, the sciences, or the arts.

So there was a hearing on this publication under the fourth condition. Now, Exhibit No. 15 is the majority opinion of the Hearing Board, and that majority—

The Court: Now, counsel, we are going to ask you to discuss with us a little further this phase of it. You are going further into the details of a trial because it is one that we

understand you to consider of a similar character. Don't you think that the limit to which you should go in those cases is to show that there was such a case and that the ruling was of such and such a character, without going into either the evidence or the argument that was presented on that case?

Mr. Bromley: Yes, sir, and I have very carefully limited myself in my offer of evidence to the citation which initiated the proceeding, the majority and minority opinions, and then the final action of the Postmaster General. And all I offered this little slip of paper for was to show that the file disclosed that this was not a routine matter that somebody else did for Mr. Walker but was called to his personal attention.

The Court: Would you consider the Postmaster General in a sense responsible for the conduct of his Department?

Mr. Bromley: I certainly do, sir.

The Court: Yes. Then why should we try to trace responsibility to him?

Mr. Bromley: Well, I did it, Your Honor, because my learned friend has taken the position that Mr. Walker ought not to be bound by the acts of his Third Assistant because maybe he didn't know about it, and I thought it was a pretty good thing to show that the fact was that not only would the law presume that he ought to know about it but that he actually knew.

Mr. DeInard: Well, I never suggested, Your Honor, and I wouldn't suggest to the Court that the Postmaster General is not responsible for the conduct of his office, and that is not what I suggested in my objection. What I suggested was that you cannot challenge the opinions expressed by the defendant in this case on a theory that he has been guilty of inconsistency by showing what some subordinate has done. I have never claimed that he is not responsible for the conduct of the Department and does not assume departmental responsibility for the decisions that were made on all publications. Of course I do.

The Court: You might take the position that any board,



any group of officers in a large firm, when they took under consideration a legal question and debated it and disagreed and finally reached a decision, that decision would represent their action and the composite knowledge of that firm, but we cannot see why you should go behind that decision and discuss how the different members of that firm deliberated.

Mr. Bromley: All right, sir.

By MR. BROMLEY:

Q. Mr. Bouton, the fact is that second-class entry was granted to this magazine on August 24, 1943, isn't it?

A. May I have the file? Admission was granted under date of August 24, 1943.

Q. And does the order granting the privileges show that some specific issue was submitted and examined by the Department? A. It shows that quite a number of issues were presented and examined.

Q. Will you pick out one of the issues recited in the order, which was examined by the Department? A. It refers specifically here to two: August 1, 1943, and September 27, 1943:

Q. Will you take the September issue, please? A. September 27, 1943, issue.

Q. Yes, sir. A. I have it.

Mr. Bromley: Before I leave the subject of the handwritten memorandum, I ask Your Honor's permission to have that little memorandum of July 20, 1943, marked Exhibit 17 for identification.

The Court: Very well.

(The memorandum referred to was marked Plaintiff's Exhibit No. 17 for identification.)

Mr. Bromley: Now I offer in evidence the issue of Hobo News of September 27, 1943, as Plaintiff's Exhibit 18.

Mr. Deinard: Objected to as incompetent, irrelevant, and immaterial.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 18 and received in evidence.)

Mr. Bromley: Will you produce your memorandum of July 19, 1943, please?

The Witness: I have it. It is my own personal—for my own personal information.

By MR. BROMLEY:

Q. In your handwriting? A. No, sir.

1958 Q. Typed up? A. Typed.

Q. Dictated by you? A. Yes, sir.

Q. Signed by you? A. No, sir.

Q. It bears your initials? A. It does.

Mr. Bromley: I ask that it be marked for identification as Exhibit No. 19.

(The document referred to was marked Plaintiff's Exhibit No. 19 for identification.)

By MR. BROMLEY:

Q. That is a contemporaneous record of a conference that you had with Assistant Solicitor Hassell and others, isn't it?  
A. No, sir. Not with Mr. Hassell. This is a personal, confidential memorandum for my own information, pursuant to conversation with Mr. Wentzel, who was then Superintendent of the Division of Classification.

1959 Q. May I see it a moment, please? A. Yes (handing paper to counsel).

Mr. Bromley: I offer this memorandum in evidence as Plaintiff's Exhibit 19.

Mr. Deinard: Might I inquire, Your Honor?

The Court: Yes.

1940

By MR. DEINARD:

Q. This memorandum, Mr. Bouton, refers to Mr. North, who appears to be unidentified. Who is he? A. Could I see it again, Mr. Deinard?

Q. Yes (handing paper to witness).

The Court: I ask counsel to state the purpose for which the tender is made.

Mr. Bromley: This memorandum shows that the Department agreed upon an administrative interpretation of the statute and came to the conclusion that it was none of its function under the statute to pass upon the quality of the contents of the magazine or anything to do with the fourth condition whatsoever. It confirms that interpretation of the Department after a conference which this man attended. It also shows that Exhibit 16, the memorandum from the Third Assistant Postmaster General, Mr. North, was delivered to Postmaster General Walker.

The Court: Assuming, then, that at a formal hearing that such was the opinion, is there anything to prevent the Postmaster General from changing his opinion if he sees fit? We realize that the precedent is persuasive—and you say that is the reason it is offered?

Mr. Bromley: That is the only reason, yes, sir.

The Court: All right.

By MR. DEINARD:

Q. Mr. Bouton, as I understand it, this matter of the Hobo News was referred to a hearing board, and I think counsel has already had you identify the majority and minority recommendations of that hearing board? A. Yes, sir.

Q. And then, as I understand it, the recommendations of the Hearing Board were submitted to the Third Assistant Postmaster General who made an order, is that correct?

A. Let me see it.

That is correct.

Q. Did you participate in the deliberations of the members of the Hearing Board? A. No, sir, I did not.

Q. You were not a member of the Hearing Board? A. No, sir.

Q. So that, as I understand it, you had no official connection with the action that was taken by the Hearing Board? A. No, sir.

Q. Well, now here in this memorandum which counsel has called to your attention, you refer to some conversations purportedly had between Mr. North and Mr. Wentzel on July 17. I want to ask you whether those purported conversations were held in your presence or not. A. They were not.

Q. So that this is simply, as I understand it, some report that was conveyed to you as to deliberations between other people? A. That is right, and just for my own information.

Q. I don't care what it was for. Is that a correct statement? A. That is right.

Q. That is a report of deliberations at which you were not present? A. That is right.

Q. With respect to the delivery of a memorandum to the Postmaster General. Were you present at the time of that purported delivery? A. No, sir.

Q. This action is based upon some hearsay report? A. Yes.

Q. You report, again, what you were told by Mr. Wentzel with respect to a purported conversation between the Postmaster General and Mr. O'Brien. Were you present at any such conference? A. I was not.

Q. Were you present at any conference with Mr. Hassell? I call your attention to some report here as to Mr. Hassell's views. Is that based on any conference you had with Mr. Hassell? A. No, sir.

Mr. Deinaud: I add to the objection, and I should like to submit the document to the Court, that it is wholly hearsay, and is not an official document, and is, therefore, incompetent.

The Court: We think, counsel, that when there are negotiations between parties before they reach a contract, that after they reach the contract the negotiations are deleted and eliminated from the record. This paper offered purports to be a memorandum for the case of the Hobo News. It doesn't appear to be the official act or finding of the Postmaster General or of any board acting under him. We think we will sustain the objection.

By Mr. BROMLEY:

Q. Will you produce your file on the magazine Laff?  
A. I have it.

Q. Will you produce the order to show cause, dated June 9, 1943, please? A. I have it.

Mr. Bromley: I offer it in evidence as Plaintiff's 1963 Exhibit 20.

Mr. Deinard: May I have the same objection as to the similar exhibits?

The Court: Very well.

(The document referred to was marked Plaintiff's Exhibit No. 20 and received in evidence.)

By Mr. BROMLEY:

Q. Will you produce the document of August 19, 1943, containing the majority and minority opinions of the Hearing Board in the Laff case? A. What was the date you had there?

Q. August 19, 1943. A. I have a copy of such report.

Mr. Bromley: I offer in evidence the majority opinion, dated August 19, 1943, as Exhibit 21.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 21 and received in evidence.)

Mr. Bromley: I offer in evidence the minority report as Plaintiff's Exhibit No. 22. ✓

Mr. Deinard: Same objection.

The Witness: A carbon copy of such report is here.

The Court: It may be admitted.

1964

(The document referred to was marked Plaintiff's Exhibit No. 22 and received in evidence.)

By Mr. BROMLEY:

Q. Mr. Bouton, second-class privileges were granted thereafter to this magazine Laff as of November 6, 1942, isn't that so? A. That is right.

The Court: May I inquire at this moment, counsel, what the nature of the charge against the magazine was—that it was obscene, or was it based on the same character of charge now before the Court, that is, that it was receiving the benefit of second-class mail matter when it was and should have been relegated to some other class?

Mr. Bromley: Yes, sir; the latter. It was charged that it did not satisfy the fourth condition and it was not made up of information and literature.

The Court: All right.

By Mr. BROMLEY:

Q. Now, on the basis of the examination of what issue or issues were second-class privileges extended to the magazine Laff as of November 6, 1942? A. All the issues published subsequent to August 28, 1943.

Q. And one of such issues was the October 1943 issue, was it not? A. That is right.

Q. Will you produce it, please? A. Yes (handing magazine to counsel).

Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit 23.

Mr. Deinard: Same objection.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 23 and received in evidence.)



1944

By MR. BROMLEY:

Q. Will you get out your file on New Love magazine, please? A. Yes.

Q. Will you produce the issue of August 1943 of the New Love magazine, please? A. Yes, sir.

Q. Was that magazine granted second-class entry? A. It was.

Q. It was granted second-class entry as of March 5, 1943, was it not? A. Yes, sir.

Q. And this action was taken on July 27, 1943, wasn't it? A. Yes, sir.

Q. The issue examined was the issue of August 1943, was it not? A. I believe a number of issues were examined in this case. That was one of them.

Mr. Bromley: I offer the issue of August 1943 of New Love magazine in evidence.

Mr. Deinard: Same objections.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 24 and received in evidence.)

By MR. BROMLEY:

Q. Will you get your file, please, on Real Detective?

Mr. Deinard: Might I suggest, Your Honor, that counsel seems already to have passed his tenth illustrative sample. I had thought that he was going to exercise the self-restraint suggested by the Court and stop at that point.

Mr. Bromley: Well, I will stop there. Perhaps I have trespassed on Your Honor's ruling. I will stop there and withdraw the last question.

The Court: We were going to inquire as to the number of these former rulings that counsel desired to introduce. We assumed that you had reached perhaps a stopping place.

The Witness: What is the title on that?

Mr. Bromley: Never mind it.

By Mr. BROMLEY:

1967 Q. Mr. Bouton, will you produce for me—I will withdraw that.

Mr. Bromley: I offer in evidence a document consisting of 12 pages, entitled, "Supplementary recommendation to the Postmaster General in the Esquire case," submitted by the Fourth Assistant Postmaster General, Walter Myers, and ask my friend to concede that this document is a true copy of that recommendation.

Mr. Deinard: This involves a matter, if the Court please, which Mr. Harding, counsel for plaintiff, and the Solicitor for the Post Office, and I have discussed before, and I suppose this is an appropriate time to bring it to Your Honor's attention.

This document which counsel has handed me is a true copy, according to my understanding, of a memorandum from Mr. Walter Myers, who appears as the dissenter in the Hearing Boards on Laff and some of the other publications which counsel has already introduced.

Mr. Bromley: He is the chairman and part of the majority in the Esquire case, and it is an official document of his.

Mr. Deinard: Just a moment. I was about to get to that, Mr. Bromley, if you will give me an opportunity.

Mr. Bromley: Excuse me.

1968 Mr. Deinard: I was calling to Your Honor's attention that this is the same Mr. Myers as appears as a dissenter in the last document introduced, as one of the concurring members in this case, and in the record in this case the plaintiff has tendered, and properly, the two reports and recommendations of the Hearing Board, that is, the so-called majority report signed by two, and the second report signed by the third.

Now, we have made no objection to the inclusion of those two items in the transcript, although properly speaking I don't believe that they constitute a part of the record, since they were purely advisory to the Postmaster General, and it is the Postmaster General's order which is here challenged,

but we thought that since that might throw some light on the controversy and might be of help to the Court, we wouldn't object to the inclusion.

The Court: What is the paper that is offered at the present time?

Mr. Deinard: This document that is now being offered is a document by way of a—some sort of an informal recommendation with respect to legislation that was later submitted by Mr. Myers individually to the defendant.

Now, sometime in April, I believe it was, counsel, having been advised that there was such a document, communicated with the Solicitor of the Post Office Department and asked for a copy of it. The Solicitor on April 24 wrote to Mr. Harding and informed him that this document was not requested by the Postmaster General as an additional

1969 recommendation in connection with the Esquire case, it was not submitted by the chairman of the Hearing Board to be considered as part of the Esquire record, and it was not read by the Postmaster General before he rendered his decision in the Esquire case. It was submitted strictly as a Post Office administrative subject.

Thereupon the Solicitor of the Post Office said that if counsel wanted to see it he would be glad to show it to him, and subsequently it was sent to him. And on May 4 Mr. Harding wrote the Solicitor, thanked him for his letter, and then said that he was surprised at the contents of the letter, because his understanding was that this was exactly as its title indicates; a supplementary recommendation in the Esquire case. Then he asked for a copy of it.

Mr. Miles wrote him again and stated again, "The facts are exactly as I outlined to you in my letter of April 24."

The Court: Let me see the paper.

Mr. Deinard: Yes (handing paper to Court).

Then later on, if the Court please, on behalf of the Department of Justice we wrote to counsel and called his attention to the fact that we could not agree that it should be made a part of the record in the above case in view of our

information that it was not submitted as part of the record in the Post Office Department nor considered by the Postmaster General.

Now, in the face of that counsel went ahead and printed the recommendation as part of their brief.

Now, as long as it does not purport to be a part of the official record in the Esquire case, we have no objection to their having supplied it to the Court for what persuasive effect it may have as the individual views of Mr. Myers, but we have made it quite clear to counsel that we will not consent to its being offered as part of the Esquire record in view of our information from the Solicitor of the Department and from others to the effect that it was never submitted as a part of this case, that it was never seen by the Postmaster General until long after the order was entered in this case.

Now, that is my information. Counsel has known that for thirty or more days, and under the circumstances if counsel wants to offer it, I think he is required to lay a foundation for it by showing that it is part of the Esquire record.

Mr. Bromley: Now, if the Court please, there is something in the pretrial order about this document.

May I see the pretrial order? The stenographer has taken mine from me and I don't have it.

The Court: Yes.

Mr. Bromley: Now, at the end of this memorandum there is a consideration of the fourth condition.

This document was a part of the official record submitted to the Postmaster General at his request prior to his decision. I regret to say that it was concealed from us; we never knew there was such a document at the time we settled the record in this case. We thereafter found out about it and we felt it should be included properly as a part of the record just the same as the majority or minority opinion. It was in fact an additional opinion by the Chairman and member of the majority of the board.

We therefore have been seeking to get it into the record and at the time of the pre-trial hearing we got a stipulation that this so-called supplementary document is a true copy of the memorandum prepared by the Chairman of the Hearing Board on or about November 22, 1943, and delivered by his office to the Postmaster General at the suggestion of the Postmaster General and that, of course, was before the decision.

Therefore it seems to me that it should have been included at the outset as a part of the official record and it should have been disclosed to us. We found out about it long after the record was certified and settled, and somewhat incidentally. It should have been included at the outset and ought to go in the record now.

Mr. Deinard: The pre-trial stipulation is to the effect that this is a true and correct copy of the certain document. Counsel has known ever since the controversy started in April that the Solicitor of the Post Office Department and the Postmaster General himself have stated this was not a part of the official record in the Esquire case, that it was never seen by the Postmaster General until after he entered his order.

That is the information which has been conveyed officially to me.

In the light of that I say that if counsel wants to prove that it is a part of the Esquire record let him go ahead and prove it.

Now, may I call your Honor's attention to the fact that when the three members of the Hearing Board considered their respective recommendations they had exhausted their function. I don't know how presumptively one member of the Hearing Board can ex parte modify or supplement a report which he had jointly signed with his associates.

This does not purport to represent the views of his associates. It is in the nature of a personal recommendation affecting legislation, from Mr. Myers to Mr. Walker.

Mr. Bromley: But you have stipulated it was submitted at Mr. Walker's request.

Mr. Deinard: But not as a part of the record in the Esquire case. We have always been perfectly clear with Mr. Harding on that point. If you want to prove that this is a part of the executive record in the Esquire case, I invite you to go ahead and prove it.

Mr. Bromley: The first paragraph of the exhibit shows that.

The Court: The Court has casually examined the paper. We found among its many paragraphs one such as this:

"Obscenity is a thing of no exact definition. It is a variable that depends upon the standards of a given time and place."

Lower down it quotes at length a decision of Judge Learned Hand on the subject of obscenity.

Now, as we understand this case, the Postmaster General did not base his action upon a finding that the publication in particular was obscene, and that being true it occurs to the Court that the paper has no possible value.

Mr. Bromley: I should call your Honor's attention to the fact that the last part of the paper has to do with the fourth condition and not with obscenity. Your Honor may be quite right about the first part, but starting near the end there is a full discussion of law about this fourth condition.

The Court: I am going to suggest to counsel you may tender the paper to the Court as you would a brief, but we don't think it is a part of the record.

Mr. Bromley: May I have it marked for identification, please, as an exhibit?

The Court: It may be marked.

(The document referred to was marked as Plaintiff's Exhibit No. 25, for identification.)

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The Court: We will suspend for a few minutes at this time and take a five-minute recess.

(Thereupon, a short recess was taken, after which the trial was resumed.)



The Court: You may proceed.  
Mr. Bromley: That is all.

# CROSS-EXAMINATION

By Mr. DEINARD:

Q. Mr. Bouton, up until January 1st of this year, as I understand it your position was as an assistant in the Classification Division. A. Yes.

Q. So that it was not until after the order of the Postmaster General involved in this case was made that you were elevated to the position of head of that division?

A. Head of the Division of Newspaper and Periodical Mail.

Q. Yes. A. That is right.

Q. Then, at the time with which we are concerned, prior to January 1, 1944, as I understand it you were a subordinate of Mr. Wentzel. A. Yes, sir.

Q. And what was Mr. Wentzel's official position? 1975 A. Superintendent of the Division of Classification.

Q. And was Mr. Wentzel in turn a subordinate of the Third Assistant Postmaster General? A. Yes.

Q. And he, of course, was a subordinate of the Postmaster General? A. That is right.

Q. And will you state to the Court whether or not that was the chain of administrative responsibility, that is, you being responsible to Mr. Wentzel, he in turn to the Third Assistant Postmaster General, and he in turn to the defendant? A. That is right.

Q. Now, will you just tell us whether you yourself made a final decision or determination, or took any action on behalf of the Department in any of the cases which counsel has called your attention to? A. No, sir.

Q. In the ordinary routine administration of the Department, was the first preliminary examination of the publication applying for second-class entry made by you or someone on your staff? A. Someone on my staff.

Q. Then, with respect to that preliminary examination, will you tell us whether or not in the usual admin-

1976 istrative course of the Department's business you reported your preliminary view to your superior?

A. That is right.

Q. And did he in turn report it to his superior? A. That would be the chain, yes, sir.

Q. And with respect to the statements that you made to counsel as to what you did with respect to these publications, you did not intend to indicate, did you, that it represented the official views of the Department or reflected the official action taken by the Department? A. No, indeed.

Q. Now, with respect to applications for original entry to second class, as I understand it in the usual routine of the Department the order is made by the Third Assistant Postmaster General? A. That is right.

Q. And in the event of his absence or disqualification is such an order made by the Acting Third Assistant Postmaster General? A. That is right.

Q. As I understand it, in the normal case no hearing board acts upon such an application, does it? A. That is right.

Q. In the event of the cancellation of second-class entry and a subsequent reapplication by a publisher, the 1977 Postal Regulations provide, do they not, for a hearing board? A. They do.

Q. As I understand it that is not by statute but by regulation adopted by the Postmaster General. A. Yes.

Q. And in the event of a citation to annul, revoke or suspend second-class privileges, the statute makes provision for a hearing, does it not? A. It does.

Q. And by Department rule of practice adopted by the Postmaster General such hearings are conducted, are they not, before hearing officers appointed by the Postmaster General? A. Yes, sir.

Q. And it was under that Departmental rule of practice, was it not, that the hearings in this case were conducted? A. That is right.

Q. Have you ever sat as a hearing officer in any of these cases? A. Not on the hearing board, no, sir.

Q. Well, will you answer my question, then? Have you ever sat as a hearing officer in any application to suspend or revoke or annul second-class entry? A. No.

Q. You do not then claim that any opinions you have given to counsel in response to his questions reflect the 1978 views of any hearing officers who have sat in any of these cases? A. No, indeed.

Q. And with respect to the reports or recommendations of hearing officers in a proceeding to annul a second-class entry, to whom are they submitted originally in the ordinary administrative routine of the Department? A. What was the first part of that?

(Thereupon, the pending question was read by the reporter.)

A. To the Postmaster General.

Q. Now, in making your preliminary inspection of a publication which is offered for second class, do you first of all consider whether or not it is a periodical as contrasted with, for example, a book or a circular? A. Yes, we do.

Q. Do you also consider, assuming that it is a periodical, whether or not it conforms to the requirements of the fourth condition? A. Yes, we do.

Q. Do you also consider whether it conforms to the physical characteristics set out in the first three conditions? A. Yes, we do.

Q. So that assuming that a publication is a periodical in the sense of continuity or periodicity of contents, that does not exhaust the matter so far as your administrative examination is concerned, does it? A. No.

1979 Q. There still remains the question as to whether or not it is originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts and some special industry? A. Yes.

Q. Now, you are familiar with the fact, are you not, that Esquire circulated through the mails as second-class matter for some years prior to this proceeding? A. Yes.

Q. Now, I call your attention in this case to a portion of the Postmaster General's order which is contained on pages 1863 and 1864 of the record, more particularly the following:

"The editor of this publication"—he is referring to Esquire—"admits that from its origin 'our humor and our articles and our fiction all stressed a man alone angle—you might call it a stag-party type of treatment', and testified, 'we called it the smoking room type of humor.' He stated that as a part of its editorial policy it runs 'cartoons that do feature sex.' Its featured pictures are stated to be 'frankly published for the entertainment they afford.'"

Now then, omitting a portion with which I am not now concerned, and going to the next paragraph:

"The result of the distribution of such a publication is not without significance. As the publication's editor testified, Esquire 'attracted a good number of imitators. 1980 There were various magazines which had various other related titles to that of Esquire, but the imitation copied only the superficial aspects, the smoking room type of humor, much, much grosser than anything we had ever used ourselves.'"

"These imitators 'would simply trade upon the superficial aspects of Esquire and emphasize what to us were the features that we least wanted to see become cheapened and common.' I wouldn't say coarsened, but they cheapened almost the desirability and value of that kind of material by making it a commonplace, whereas we had thought of it as being a smart and an exclusive type of feature.'"

Now, Mr. Benton, I call your attention to those statements in the Postmaster General's order and want to ask you with reference to the publications about which counsel has inquired, but omitting the comic books and omitting the National Police Gazette.

Will you tell us whether or not these periodicals are among the class of imitators of Esquire that have sprung up in the last few years?

Mr. Bromley: I object to that as incompetent and calling for a conclusion not properly the subject of testimony. The documents are in evidence and they speak for themselves.

The Court: I sustain the objection.

By Mr. DEINARD:

1981 Q. I ask you, Mr. Bouton, whether the magazines which counsel has called to your attention, Gags, Hit, Halt, Hello Buddies, Laff, are new to the publication field in the last few years.

Mr. Bromley: The same objection. I think that calls for a conclusion. The magazines speak for themselves.

The Court: He may answer this question.

The Witness: I think they are.

By Mr. DEINARD:

Q. And I will ask you whether there were any prototypes of such magazines, that is, magazines of the same general content and style—

Mr. Bromley: I object to that as—

Mr. Deinard: I have not finished yet, Mr. Bromley.

Mr. Bromley: I beg your pardon.

The Court: I overrule the objection.

By Mr. DEINARD:

Q. —in general circulation prior to the circulation of Esquire.

Mr. Bromley: I object to that as improper.

The Court: We think counsel here might be permitted to state that they are of like character in general makeup and field served.

Mr. Deinard: I would like to submit my question with the qualification which your Honor has suggested.

By Mr. DEINARD:

1982 Q. Will you tell us whether they are or are not of general like character with respect to their dominant features as Esquire, and I am leaving out of

account the comic books and Police Gazette. A. Yes, they are.

Q. Will you tell us whether or not they have as a group arisen since Esquire came into general circulation? A. Yes.

Q. Now, I take it that as appears from some of the matter which has been introduced, that there has been controversy in the Department over the period of the last few years about these magazines. A. Yes, there has.

Q. And, as I understand it, you do not claim that your own personal views are necessarily reflected by any of the action that has been taken either by the hearing boards or by the officials of the Department? A. That is right.

Q. And, as I understand it, you do not claim to be able to testify as to what the official views of those officials may have been. A. That is right.

Q. You did not participate in any way in the proceedings which eventuated in the Postmaster General's order in this case, did you? A. The Esquire case?

Q. Yes. A. No, sir.

Q. Now, you were asked with respect to whether 1983 the Department has given consideration to the question of whether or not the contents of the magazine contributed to the public good and welfare.

Mr. Bromley: Could I have the question read back? I was inattentive. I didn't hear that.

(Thereupon, the pending question was read by the reporter.)

By MR. DEINARD:

Q. And the transcript shows that you answered "It must have some value, but I can't say that I have used the same language as you have used there."

You did not purport, did you, to reflect the official policy view of the Department in your answer? A. No, I did not.

Q. Has the question of determining the official policy of the Department as to such publications ever been submitted to you? A. It has not.



Q. To revert for the moment to the chain of administrative responsibility, has there ever been a delegation of any official responsibility to you in any of these matters?  
A. There has not.

Q. So far as you know, has there ever been an official delegation to your superior, Mr. Wentzell?  
A. There has not.

Q. Then you were asked the following question:  
"Isn't it a fact that you have never considered the quality of the contents of the mailable magazine from the standpoint of whether it made a special contribution to the public welfare," and your answer is as it appears from the transcript as follows:

"I have not considered any quality measure. I have considered the fourth condition, however."

Can you amplify that statement for us and tell us upon your preliminary consideration of applications for second-class entry, whether or not you made an effort to determine whether a magazine was originated and published for the dissemination of public information, for example? A. Yes, we did.

Q. And was that likewise true with respect to the alternative provision as to its devotion to literature, and so forth? A. It is.

Q. Then you were asked this question:  
"What your Department does is to seek to identify a proffered magazine as to whether or not it is a periodical?"

And your answer appears as follows:  
"Pursuant to an application for its admission."

You did not intend by that answer, did you, to indicate that when the Department determines that a publication is a periodical, that it has exhausted its administrative responsibility? A. No.

Q. Assuming that it is a periodical, you still have to inquire, do you not, into its compliance with the four conditions required of such publications for second-class entry?  
A. We do.

Q. Now, will you just tell the Court approximately how many applications for second-class mailing privileges are made each year to the Department? A. Between 2000 and 2500 applications.

Q. Most of them, I take it, are routine affairs? A. Yes.

Q. Will you state whether or not applications for second-class entry have been denied by the Department from time to time on various grounds? A. They have.

Q. And will you tell us whether or not such denials have been in certain cases grounded upon non-compliance with the fourth condition?

Mr. Bromley: I object to that on the ground that the best evidence is the file.

The Court: I don't think the answer would be especially prejudicial. He may answer.

The Witness: They have.

By Mr. DENARD:

Q. Now, with respect to mailability, that is, whether or not a publication violates any of the criminal statutes 1986, relating to mailable matter, that as I understand it is a matter which has been committed under Postal Regulations to the Solicitor of the Department. Is that right? A. That is right.

Q. Then, it is not a matter which is passed upon by the Classification Division? A. It is not.

Q. I assume that if the question of mailability is brought to your attention you initiate an inquiry by forwarding the item to the Solicitor? A. We do.

Q. And that completes your function in that type of case, does it not? A. It does.

Q. And when you were asked by counsel whether or not your duty was limited to identifying whether a proffered article is a magazine or not under the second class, and you answered that that was a fair statement, did you have in mind the various operations that we have referred to which are necessarily involved in an administrative determina-

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tion of whether a publication is a periodical and whether it complies with the four conditions.

A. Yes, I did.

Q. Now, you answered counsel yesterday with respect to one or more of these magazines, that they are under study now. Will you tell me whether or not you referred to further administrative determination to determine whether or not the publications should retain their second-class privileges? A. That is what I meant.

Mr. Deinard: That is all.

### REDIRECT EXAMINATION

By Mr. BROMLEY:

Q. These studies that you have just spoken of did not begin until after the Esquire case was started, did they?

A. This particular study did not begin until after the Esquire case.

Q. The study you referred to in your answer to Mr. Deinard's question did not begin until after the Esquire case, did it? A. That is right.

Q. Now, whatever action you have taken as a member of the Department was reviewed by your superior officers, was it not? A. It was.

Q. And in the cases in which you have acted in granting second-class privileges, your action was approved, was it not? A. They were.

Q. Have you any idea how old the National Police Gazette is, Mr. Bouton? A. It is quite old. I don't know the exact years.

Q. Quite old. It goes back sixty years or more? A. I don't think with that exact title. But anyhow, the publication does go back many years.

Q. Well, it is more than fifty years old, isn't it? A. Yes, sir.

Mr. Bromley: That is all.

1959

## RECROSS EXAMINATION

By Mr. Deinaud:

Q. Mr. Bouton, when counsel asks you about your action in granting second class privileges, I don't understand that you mean to convey an impression to us that you ever enter an order or take any action either granting or denying a second class privilege, do you? A. No, I do not.

Q. All you administratively can do is to submit a recommendation to your immediate superior. Is that right? A. That is right.

Q. Now, with respect to the National Police Gazette, do you happen to know whether or not that magazine originally started as a policeman's journal? A. That is my recollection, yes, sir.

Q. And I understand that your statement with respect to its age is not intended to indicate that the character of the magazine has remained the same over these many years. A. That is right.

Q. Its ownership changed, did it not, at various times? A. It did.

Q. And the character of the journal has changed? A. It has.

Mr. Deinaud: That is all.

Mr. Bromley: That is all.

(Witness excused.)

Mr. Bromley: The plaintiff rests.

The Court: I might inquire in what form may the finding of the Postmaster-General and the record made before his Department be considered as a part of the record of the case. Has it been attached to any pleading or attached to any exhibit or in what form is it before the Court?

Mr. Deinaud: It is my understanding, Your Honor, that it is appropriately a part of the record in this case because it is the administrative record into which the Court is inquiring.

In the answer submitted by the defendant in paragraph 34 appears this allegation:

"There is made a part of this answer the record of the proceedings before the Board of Postal Officials with the exhibits attached thereto in accordance with the 1990 provisions of the stipulation previously entered into between the parties hereto," and there was a stipulation in this proceeding which was, I believe, approved by one of the judges of this court which recites that — I am reading from paragraph 3 —

"The record of proceedings had before the Post Office Department hearing board, including the exhibits which were offered at said hearing, shall be deemed to be a part of the answer in this case without physically annexing the same thereto, and the said record including such exhibits shall be available to plaintiff's counsel at all reasonable times."

Of course, a large part of the record is concerned with the litigation of the issue of obscenity which was tendered in the original citation, but since the order is not based upon that ground, since we don't defend on that ground, and since the pre-trial stipulation eliminated it, I assume that part of the record is really irrelevant in this proceeding.

What I want to make clear is that while we concede, and there is no doubt in our mind but what the record is appropriately before the Court, we do not agree that all the testimony in that record is relevant in this proceeding. Quite the contrary.

The Court: In the event of making up a record for appeal some question, of course, might come before the 1991 Court as to whether or not all of this should go up, but that will be a bridge to be crossed when reached.

Mr. Deinard: Yes, I assume by this procedure that the record is not in evidence in the sense that it is being offered in evidence before this Court, but I suppose it is historically the complete record of the administrative proceeding which this Court is examining.

Mr. Bromley: In view of my friend's last statement, may it please your Honor, I now offer in evidence the three

printed volumes of the record before the Post Office Department which have heretofore been filed with the Clerk in this matter.

I did not think there was any question, since he made it a part of his record, and we stipulated, that it was a part of the record.

The Court: We think they are a part of the answer in such a way that they are a part of the record of this hearing.

Mr. Bromley: Yes, sir.

The Court: There being no question about it it is not necessary for you to offer them.

Mr. Deimard: Your Honor, if the Court would ordinarily recess at this time I wonder if we might have until the reconvening of the Court to determine whether or not there is any further testimony. I think not. I think we will rest.

The Court: The Court would like to say to counsel that in this case we would like a thorough discussion of the question by counsel on both sides, and we will give you reasonable time in which to present it.

We also wish to take occasion to thank counsel for the manner in which this case has been presented. Oftentimes we have cases presented when counsel are beside themselves and forget that there is another side to the controversy. Sometimes we have counsel who are inexperienced in courtroom practice although learned in law.

We have not had that in this case. It has been well presented by both the plaintiff and the Government.

We might have, if counsel is prepared to proceed, one argument before lunch if that argument will not cover more than 25 minutes. If it will cover more than that we will recess and take up the argument after lunch.

Mr. Bromley: I assume that since this is the trial of an action that it is up to the Government to make its closing argument first since I opened first.

Mr. Deimard: What is that?

Mr. Bromley: The ordinary practice in the trial of an equity suit is for the plaintiff to open and the plaintiff to



close. That is, while I made the first speech at the outset, I get the opportunity to make the last speech at the close, and you make the first speech at the close.

The Court: That is the usual practice.

1993 Mr. Deinaud: I defer to Mr. Bromley's hours, which are grayer than mine and his greater experience in equity proceedings, and I am willing to go ahead first.

In fact, I shall be delighted to have the first crack at the matter.

I didn't want the Court, however, to overlook the fact that I have not as yet formally rested and, as I suggested before, if it would not inconvenience the Court at all I would like to have the option to defer my formal resting until after lunch.

The Court: You may have that option and if you think of something further you wish to include in the record, all right.

The Court will recess until one-thirty.

(Thereupon, at 12:05 o'clock p. m., a recess was taken until 1:30 o'clock p. m. of the same day.)

1994

## AFTERNOON SESSION

(The proceedings were resumed at 1:30 o'clock p. m. following the noon recess.)

The Court: Does the Government have further evidence?

Mr. Deinaud: No, Your Honor, but before resting I should like to be permitted to move the Court individually as to each of the exhibits offered by the plaintiff and received in evidence, to strike them from the record on the ground that they are incompetent, irrelevant, and immaterial, that they are an inquiry into collateral matters not related to this proceeding, have no probative value, that the matters are not included within the administrative record which is before the Court, that there is no ambiguity in the provisions of the Classification Act with which we are concerned, and more particularly section 226, which would

warrant proof of so-called contemporaneous construction, that no estoppel runs against the Government because of the errors or omissions, if any, of the defendant's predecessors, and I should like, if the Court would accept the motion in that form, to make the motion separately as to each exhibit, so as to eliminate the necessity of repeating it some 24 times.

The Court: You may so treat it. The Court will carry the motion along and dispose of it along with the merits of the case.

Mr. Deinard: The defendant rests.

### III.

#### ADDITIONAL PAPERS.

*Opinion of Judge Davidson.*

Filed Jul 15, 1944

The Postmaster General of the United States revoked the second-class mailing permit of the plaintiff. It seeks to enjoin the enforcement of the order so made. The question is, was the action of the Postmaster General authorized by law? By order of the highest court a rule was long ago announced: "The conclusion of a head of an executive department upon a matter of fact within his jurisdiction will not be disturbed by courts unless clearly wrong." (Burleson case, 255 U. S. 407). A lengthy hearing was given the plaintiff by the Postmaster General and his chosen aides, the record of which is before us, embracing some 1,865 printed pages. At the conclusion of such hearing, the Postmaster General stated the ground for the action now complained of. This statement was in part as follows:

2012. "Order No. 23459

This is a proceeding under the act of March 3, 1901 relating to the second-class mailing privileges accorded to the publication "Esquire" and its publisher.

In view of this voluminous record, at the onset it may be well to clarify and state just what is the issue in this proceeding. This is a proceeding involving the use of the second-class mailing privileges. Consequently, there is not involved the question of nonmailability as first, third or fourth-class mail matter nor of the right of freedom of speech, or of the freedom of the press. \* \* \* \*

Does the publication fail to comply with the Fourth condition of the Act of March 3, 1879, section 14 (20 Stat. 359; 39 U. S. C. 226) and thus not being originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry, is not entitled to second-class mailing privileges. \* \* \* \*

This is essentially a judicial matter of deep significance, and the Postmaster General should not be hesitant in exposing these conditions to the critical public eye. Nor should he be reluctant to determine the matter in such a way that all phases of it may be fully considered and decided by a court of competent jurisdiction where every right and interest of the publication, the government, and the public may be fully protected. \* \* \* \*

Writings and pictures may be indecent, vulgar, and risqué, and still not be obscene in a technical sense. Such writings and pictures may be in that obscure and treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good. When such writings and pictures occur in isolated instances their dangerous tendencies and malignant qualities may be considered of lesser importance.

When, however, they become a dominate and systematic feature they most certainly cannot be said to be for the public good, and a publication which uses them in that manner is not making the "special contribution to the public welfare" which Congress intended by the Fourth condition. \* \* \* \*

The editor of this publication admits that from its origin "our humor and our articles and our fiction all stressed a man alone angle—you might call it a stag party type of treatment", (3) and testified "we called it the smoking room type of humor". (4) He stated that as part of its editorial policy it runs "cartoons that do feature sex". (5) Its featured pictures are stated to be "frankly published for the entertainment they afford". \* \* \*

I cannot assume that Congress ever intended to endow this publication with an indirect subsidy and permit it to receive at the hands of the government a preference in postal charges of approximately \$500,000 per annum. (11) \* \* \*

The Postmaster General is by law charged with the duty of dividing his mail matter into four classes. The law as it now is was written many years ago.

2014 "Sec. 7. That mailable matter shall be divided into four classes:

"First. Written matter;

"Second. Periodical publications;

"Third. Miscellaneous printed matter;

"Fourth. Merchandise."

Matter of second class is thus described:

"Sec. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections twelve and fourteen.

"Sec. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject: Provided, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same."

"Sec. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

"First. It must regularly be issued at stated intervals, as frequently as four times a year; and bear a date of issue, and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguish printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry, and having a legitimate list of subscribers." (194 U. S. 93, now comprising Sections 221, 224, 225 and 226, Title 39, U. S. C.)

Since the law creates the duty of classification and 2015 provides that the mail should be placed in four piles, as it were; the defendant must determine to which group a parcel belongs. This determination constitutes him into a fact finding agency and his act is of a quasi-judicial character. It will be seen that Section 225 indeed provides that second class mail may be examined at the office to see if it is subject to a high rate of postage. This means more than examining the bundle or the wrapper. It means an examination of the contents of the printed matter. Thus, in the Riverside case, 194 U. S. 88, styled Houghton v. Payne, a publisher conceived the idea of sending out to his readers in magazine form the cream of literature. The front page of the magazine met all the conditions of second class mail entitling it on the face of it to the cheap rate accorded such second class mail. The magazine, however, was within itself a complete book. Books are third class mail and although the magazine had been published for a long period, the Postmaster General held that he was not entitled to the cheap rate of second class mail. Again, in

what we might call the Music Masters' case, styled *Bates & Guild Co. v. Payne*, 194 U. S. 106; the publisher conceived the idea of supplying its readers with choice selections of music and doing so in a magazine to be entered as second class mail. It was entitled "Masters in Music". It was issued in 1903. The first issue was devoted to Mozart and contained his portrait and a brief biography, then an essay, followed by thirty-two pages of music. Its front page and its date of issuance was to take the appearance, and make, in fact, a periodical, so far as its regular appearance 2016 was concerned, but it was, in fact, a book of music.

The Postmaster General ruled that it was not entitled to the cheap rate of second class mail, but should be classed as books, and therefore, receive the postal rating of third class mail. The test for the second class mail privilege is: The periodical "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry." By the word periodical is meant that it must be like a newspaper printed at given periods of not less than four times a year.

What was contemplated by the law giving the Postmaster General as his chart and guide in accepting publications for second class mail? The publication must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry. There is perhaps no better way to arrive at a man's thoughts than to put oneself in the place of that man to envision as far as possible the things that he saw and the emotions that he felt. What was in the mind of Congress in sending out newspapers and magazines as second class mail matter at a small fraction of the cost of transportation and delivery? Congress had a purpose. And what was the character of the literature that was to receive the benefit of this special treatment? In 1870 the nation was in the midst of what may be known as the Victorian era, not only of the pious, home-making Victoria,



but we were in the shadow of Jefferson, and under the then living influences of men like Lincoln, Lee and William McGuffey. Lincoln had said, "I am not bound to win, but I am bound to be true". Lee had said to his son and to the boys at Washington-Lee University, "Duty is the most sublime word of the English language". These men of '79 who sat in the halls of Congress were boys in the fifty's. They may have listened to William McGuffey, filling the chair of moral philosophy in the University of Virginia. This, he did for more than a quarter of a century. If their training only extended to the common school, they found there the series of readers by William McGuffey—First, Second, Third, Fourth, Fifth and Sixth Readers. The first was but a primer for a boy of tender years, but the fifth and sixth embraced the most beautiful classics. For a period of sixty years or more, the American youth, or we may safely say millions of them, learned at the feet of William McGuffey. In the primer, about every fourth lesson, was one that taught the child how to live. He must not lie, and there followed the story of Washington and the cherry tree. He must be honest and just, and there followed the story of the broken window and the silver dollar. He must revere and respect his parents and there followed the story of the jeweler who would lose a deal of great profit rather than awake his father from the joy and comfort of his evening siesta. These environments created a standard of ethics and morals which ruled the America of our fathers. It was the Victorian era translated to the American conception. Jefferson who died in 1826 was the champion of public education. He died without the realization of his dreams but he had sown the seed. Men like Andrew Jackson and Abraham Lincoln had been educated in the school of hard knocks and bumps, but nevertheless, educated in that virile type of democracy affording an equal opportunity to the youth. It was men of this type, brought up under the ethics and standards of this period, who wrote in 1879, Section 226, Title 39 of

the U. S. Code giving a low rate to newspapers and like publications. May the Postmaster General, therefore, have not been warranted in reaching his conclusions that the literature referred to was literature of desirable type of an educational value? The Postmaster General had to make his conclusions. He had to test the contents of the magazine by some standard. It may be that the standard of yesterday doesn't carry the same strict interpretation for it has well been said that: "There is nothing good or bad but that thinking makes it so". An appalling thing daily witnessed in our courts is the long string of juvenile delinquents: One has stolen an automobile, another is a sex pervert, while another is a bank robber, or at least a pilferer in some one's mail. It is more appalling to find that these young men in the main are devoid of any sense of shame. In their minds, they have no code of morals that they have been ashamed to break. They know no standard. It must be that they have not been taught. Indeed a man's conscience is dependent upon his conception of that which is just and right. A cannibal of the South Seas has no conscientious scruples about catching, beheading, and barbecuing, as it were, the child of his neighbor. There may be many contributing causes to the delinquency of youth, but may not the Postmaster General have reasonably had in mind that of literature as one? And did not the authors of the measure enacted by Congress have in mind good literature?

2019 Turning away from the public mind, let's look behind the scene in the halls of Congress when the Bill was passed. Congressman Money of Mississippi, Manager of the Bill, said,

"In fact, it does not contemplate censorship of the press. It is for the protection of the legitimate journals of the country." (Congressional Record, February 28, 1879, p. 2135).

Continuing further, he said:

"We know the reason for which papers are allowed to go at a low rate of postage, amounting almost to the franking.

privilege is because they are the most efficient educators of our people. It is because they go into general circulation and are intended for the dissemination of useful knowledge such as will promote the prosperity and the best interest of the people all over the country."

In *Houghton v. Payne*, 194 U. S. 88, the Supreme Court quoted Speaker Cannon of the House of Representatives as follows:

"The policy of that legislation being to encourage the dissemination of sound and desirable reading matter among the masses of the people of the country at cheap rates."

*United States v. Burlington*, 255 U. S. 407:

"This privilege "is justified as part of the 'historic policy of encouraging by low postal rates the dissemination of current intelligence.'"

This view was undoubtedly accepted by Chief Justice White, one of the great jurists of our country. We find in his opinion in the *Lewis* case, 229 U. S. 302:

"Indeed, we think also that it is not open to controversy that a review of these statutes will demonstrate that it was always conceived not only that Congress might so exert its power as to favor the circulation of newspapers, by giving special mail advantages, but that it also possessed the authority to fix a general standard to which publishers seeking to obtain the proffered privileges must conform in order to obtain them." \* \* \* \*

"And it is obvious and is not disputed, that the classification thus adopted was based, not upon merely inherent distinctions or differences in the nature and character of the articles asailable matter and the cost of their carriage, but rested upon broad principles of public policy." \* \* \* \*

"The extremely low postage rate accorded to second-class matter gives these publications a circulation and a corresponding influence unequalled in history."

In 1879 our public school system was yet in its infancy and we conclude that the Postmaster General was warranted in taking the view that Congress meant for second class mail to be a contribution toward public education and therefore, that the literature given such low rate should possess merit and be of educational value.

The defendant Walker has some basis for his findings in the nation's background and the traditions of our people. Then he has 1800 pages of testimony embracing views of many people and various exhibits. Looking for a moment at this record, we find the editor of plaintiff's magazine upon examination before the department admitted that the humor and cartoons as well as the articles of the magazine were of the stag party variety. They were called the smoking room type of humor. The girl gag type of humor was the gold-digger, confined to sex, jokes, and chorus girls and like art. Witness Solomon H. Metz testified for the 2021 department, giving his appraisal of the literary value:

"It seems to me that the whole atmosphere of this publication is such as to reduce the main interest of living to sex, and then degrade sex to its lowest vulgar expressions. I deem it destructive of morality and ethics."

Men differ about their appraisal of these things. They did in the record in the Postmaster General's hearing. The Postmaster General, in reaching his findings, however, had their views before him. It further appeared that Esquire has many imitators and that there is now a vast volume of this type of mail, and in connection with this volume of printed matter, he probably had in mind that some newspapers of the highest type were being limited print paper to the degree that they asked their readers to share the paper with others. Then again, he had before him, no doubt, his own reports. On page 89 of his Annual Report for 1941, he shows that first class mail produced \$456,128,710.86; that it created expenditures of \$309,313,132.13. Thus, the han-

dling of first-class mail gave to the department a new revenue of \$146,000,000.00 in round figures. In second class mail, the figures ran in reverse: Total revenue, \$25,724,959.81; total expenditures, \$109,244,706.11, a deficit in round figures of more than \$83,000,000.00, which in a sense amounted to a bonus thus paid to those having a permit of second class mail. The figures for 1942 show a net deficit for second class mail of \$86,000,000.00 in round figures. The figures for 1943 are not yet in print.

In reaching his decision and viewing the matter in the light of Chief Justice White, Speaker Cannon and others, the Postmaster General, acting in the scope of duty, 2022 was confronted with creating annually a useless deficit unless the public who paid the bill was receiving some substantial benefit thereby, such as was in contemplation of Congress. In the light of these facts, we cannot say that his ruling was either unjust or unlawful. The plaintiff has not been deprived of property. It has not been stripped of any vested right. It may still publish its book or magazine. It may still mail it, but the Postmaster General doesn't elect to treat it as that character of mail to which Congress has extended special treatment in the way of rates. He says in his Report that it would amount to a bonus of \$500,000.00 annually to the plaintiff. Moreover, the plaintiff may apply at any time for the reinstatement of its publication when it has brought it within the scope and purpose of Congressional enactment, and until that time it may pay the same postage that authors and publishers of books pay for their production.

Censoring. Does the act of the Postmaster General amount to that of censoring the mail? On this point, we have found more difficulty. A censorship, except for military reasons, is the denial of the right of freedom of the press and the right of freedom of speech, and that is a denial of all those rights and privileges which are had in the enjoyment of a free government. It is the first step to a perpetuated tyranny. We feel, however, that there are

safeguards against such. If the Postmaster General deals with an individual case without classifying it in a group, his act becomes capricious and arbitrary, and is subject to a review by the courts. Moreover, he is no doubt subject to the will of the President. Finally, if his course becomes too general, Congress can re write the Act that he has failed to interpret in keeping with prevailing standards and conceptions if he has so misinterpreted it. There is a very decided difference between grouping and classifying and that of censoring. Censoring deals more with the specific article, the deleting of objectionable portions. Classifying means grouping. This was the view of Judge White, Judge Clark and others in the cases above referred to.

\*The Radio Commission's refusal to renew the broadcasting license on the ground that public interest, convenience or necessity would not be served, *held* not to constitute "censorship" of the radio station because there was no attempt on the part of the commission to subject any portion of the applicant's broadcasting matter to scrutiny prior to its release. (47 Fed. 2nd 670.)

The classification of things, however, is a different process.

"The word has been defined as meaning a characterization through the selection of some quality or feature; a grouping of classes or a putting together of like subjects or facts under a common designation." (14 CJS 1194.)

"Word 'classification' as used in school budget statute, means putting together of like subjects or facts under common designation." (7 Words and Phrases 431.)

"Classification" is in law grouping of things in speculation or practice because they agree with one another in certain particulars and differ from other things in those same particulars." (7 Words and Phrases 432.)

204 Appeals to the court do not lie from orders of the President or his executive officers. A court will not



review or overturn an act of an executive officer charged with the performing of a given duty unless the act is arbitrary, capricious or unlawful. Is the order of the Postmaster General unlawful, capricious or arbitrary? There is a very striking analogy between his attitude in making this classification and the act of the draft board in classifying a soldier for military duty. The draft board passes upon any claim of exemption that may be made by the draftee. The soldier may appeal to a board of appeals constituted for that purpose. If he is dissatisfied with that ruling, he may not appeal to the court. The court will review the classification, however, only when the draft board has acted arbitrarily or capriciously in disregard of law, and this is brought to the court's attention not in the way of appeal, but ordinarily by a writ of habeas corpus. The Supreme Court has lately held in the Jehovah Witnesses case, opinion by Justice Black, entered January 3, 1944, and not as yet in print, in the case of Nick Falbo, petitioner, that the court was without jurisdiction to set aside the ruling and finding of the draft board on matters of classification. In the Victor Bürger case, styled Milwaukee Publishing Company vs. Burleson, 255 U. S. 407, the court held:

"The extremely low rate charged for second-class mail—to carry it, was said, in argument, to cost seven times the revenue which it yields—is justified as a part of 'the historic policy of encouraging by low postal rates' the dissemination of current intelligence." It is a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes is derived from the newspaper and other periodical press. 229 U. S. 301, 304."

"That the power to suspend or revoke such second-class privilege was a necessary incident to the power to grant it has long been recognized by statute and by many decisions of this court."

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"Where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they have the power, and will occasionally exercise the right of so doing."

"As to what is second class mail matter, *Houghton v. Payne*, p. 88, followed." (194 U. S. 106.)

After a full hearing in which the Postmaster General shows due consideration of the subject and in connection with the consideration thereof, he withheld the enforcement of the putting of his order in operation until the court had passed upon his ruling showing that his attitude towards the plaintiff was not in any sense arbitrary. Having thus in good faith performed the duty of his office as he saw it, we find no logical ground to enjoin his action, or stated otherwise, no valid legal basis can be had for the substitution of the court's views for those of the executive officer. His findings like those of the Master or the Jury must be upheld by the court. The injunction will, therefore, be denied.

T. WHITEFIELD DAVIDSON

Judge

2026

Filed Jul 24 1944

*Findings of Fact and Conclusions of Law*

The above entitled cause is a civil action brought to enjoin the enforcement of, and to have declared invalid an order of the defendant revoking the second-class mailing privileges of plaintiff's periodical, Esquire.

The case came duly on for trial before the undersigned on July 10, 1944, and was tried on that day and succeeding days. Bruce Bromley, Esq., John P. Harding, Esq., and

Howard Boyd, Esq., appeared for plaintiff, and Benedict S. Deingard, Esq., appeared for defendant. The court having received and considered oral argument and written briefs of both parties and having entered its opinion, now makes the following findings of fact and conclusions of law:

*Findings of Fact*

(1) Plaintiff is engaged in the publication, distribution, and sale of the monthly periodical *Esquire Magazine*.

(2) Defendant is and has been since September 11, 1940, the Postmaster General of the United States and the head of the Post Office Department, an executive department of the United States. Defendant is a resident of the City of Washington, District of Columbia.

(3) The matter in controversy here exceeds the sum of \$3,000, exclusive of interest and costs.

(4) On December 15, 1933, plaintiff applied for and received second-class mailing privileges for *Esquire*.

(5) On September 11, 1943, pursuant to the provisions of the Act of March 3, 1941 (39 U. S. C. 232), a citation was issued to plaintiff to show cause why such privileges should not be suspended, annulled, or revoked. The citation was amended on October 4, 1943. Pursuant to the Department's Rule of Practice (Order No. 17493, April 21, 1942; 7 F. R. 3001-3003), the defendant designated three hearing officers to conduct and preside at the hearing of the citation. Extensive hearings were accordingly held, and by agreement two grounds for revocation of the second-class permit for *Esquire* were tried at these hearings: (1) Whether the cited issues of *Esquire* (comprising the monthly issues from January to November, 1943) were nonmailable on the ground of obscenity within the meaning of 18 U. S. C. 334, and (2) whether *Esquire* failed to comply with the Fourth Condition of 39 U. S. C. 226 for second-class entry of a periodical publication, requiring, *inter alia*, that the periodical be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry."

(6) At the hearings, both oral testimony and documentary evidence were received, and plaintiff was given full opportunity to be heard and to present its case. It is conceded that the hearing accorded plaintiff was fairly conducted and satisfies all of the requirements of due process of law. On November 11, 1943, the hearing officers submitted to defendant their respective recommendations together with a transcript of the proceedings, which included the testimony and exhibits, and the briefs and arguments of counsel.

(7) On December 30, 1943, defendant entered an order revoking the second-class mailing privileges of Esquire effective February 28, 1944, on the ground that it did not comply with the Fourth Condition of Section 14 of the Act of March 3, 1879 (39 U. S. C. 226), i.e., that it was not originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry.

(8) By stipulation filed in this case, the record of the proceedings had before the hearing officers, including the exhibits, were designated a part of defendant's answer, and the answer specifically incorporated said record. By stipulation embodied in the pre-trial order of this Court, it was agreed that defendant does not defend on the contention that Esquire is obscene within the meaning of 18 U. S. C. 224 or nonmailable within the provisions of that or any other statute.

(9) The determination and order of the defendant are supported by substantial evidence in the record before him, and are neither arbitrary nor capricious.

Note: This Court does not make any independent findings as to whether Esquire is in fact "originated or published for dissemination of information of a public character, or is devoted to literature, the sciences, arts, or some special industry," inasmuch as the Postmaster General is authorized by law to make such findings, and since the function of this Court does not extend beyond an inquiry

into whether the Postmaster General's order is clearly wrong or not supported by any substantial evidence. *United States v. Barleson*, 225 U. S. 407; *Bates & Guild Co. v. Payne*, 194 U. S. 106; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 104.

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*Conclusions of Law*

(1) This Court has jurisdiction to hear and determine this matter under Section 24 of the Judicial Code (28 U. S. C. 41).

(2) The Postmaster General is by law charged with the duty of classifying mail matter into the four classes prescribed by the Act of March 3, 1879 (39 U. S. C. 221, et seq.) and therefore of determining to which class mail matter belongs; the standards for such classification are sufficiently definite.

(3) The determination of the Postmaster General that Esquire did not comply with the Fourth Condition of Section 14 of the Act of March 3, 1879 (39 U. S. C. 226), and therefore was not entitled to second-class mailing privileges thereunder, was within the jurisdiction of the Postmaster General, is presumptively correct, and is binding upon the court unless it is clearly wrong.

(4) The Postmaster General's determination that Esquire was not originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, was not clearly wrong, nor unlawfully made, nor arbitrary, capricious or unsupported by substantial evidence.

(5) The order of the Postmaster General, the enforcement of which is sought to be enjoined, is lawful and valid.

(6) The order of the Postmaster General involves only the amount of postage to be paid by plaintiff; it does not exclude Esquire from the mails; it does not impose censorship, nor involve any infringement of the right of free speech or abridgment of freedom of the press.

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(7) The complaint should be dismissed and the injunction denied, with costs to defendant. Let judgment be entered accordingly.

2030 (8) In view of the court's disposition of this case on the merits, the court finds it unnecessary to act upon defendant's motion to strike the exhibits offered by plaintiff and received in evidence by this Court.

**T. WHITEFIELD DAVIDSON**

*United States District Judge*

Dated at Washington, D. C., this 24th day of July, 1944.

2031

Filed Jul 27 1944

*Judgment*

This cause came on to be heard on its merits before the Court on July 10, 11 and 12, 1944. Testimony was taken, exhibits were offered, and the case was argued by counsel for both parties. Upon consideration of the entire case, the Court having entered its opinion and made and filed findings of fact and conclusions of law.

It Is Hereby Ordered, Adjudged and Decreed

1. That the plaintiff's application for temporary and permanent injunctive relief is denied.

2. That the plaintiff's complaint herein be, and same is hereby dismissed on the merits.

**T. WHITEFIELD DAVIDSON**

*United States District Judge*

Dated: July 27, 1944.

Seen

HOWARD BOYD

HUGH LYNCH, JR.

ALFRED S. BERG



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Filed Aug 18 1944

*Notice of Appeal*

Notice is hereby given this 18th day of August, 1944, that Esquire, Inc., the plaintiff above-named, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 27th day of July, 1944 in favor of defendant against said plaintiff, which judgment denied plaintiff's application for injunctive relief and dismissed plaintiff's complaint in the above-entitled action.

HUGH LYNCH, JR.

*Attorney for Plaintiff,*

616-621 Transportation  
Building,  
Washington, D. C.

TO:

EDWARD M. CURRAN, ESQ.,

United States Attorney for the  
District of Columbia,  
Washington, D. C.

FRANCIS M. SHEA, ESQ.,

Assistant Attorney General,  
Department of Justice,  
Washington, D. C.

CLERK, United States District Court,  
District of Columbia.

2033

Filed Sep 20 1944

*Order*

It is by the Court this 20th day of September, 1944,  
Ordered:

That the Clerk of the Court transmit to the United States Court of Appeals for the District of Columbia the originals of the exhibits filed in this cause in lieu of copies thereof.

**DANIEL W. O'DONOGHUE**  
*Justice.*

**HUGH LYNCH, JR.,**  
616 Transportation Building,  
Washington 6, D. C.,  
*Attorney for Plaintiff.*

No objection.

**FRANCIS M. SHEA**  
*Asst. Atty. General.*

2036

Filed Oct 28 1944

*Stipulation as to Contents of Record on Appeal*

It Is Hereby Stipulated and Agreed by, and between the undersigned that, pursuant to Rule 75(f) of the Federal Rules of Civil Procedure, the following shall be included in, and shall constitute, the record on appeal to the United States Court of Appeals for the District of Columbia from the judgment entered in the above-entitled action on July 27, 1944:

1. Amended complaint for injunction verified February 11, 1944, and Exhibit A annexed, filed February 15, 1944.

2. Stipulation approved by Hon. T. Alan Goldsborough and filed February 8, 1944, relative to continuance of mailing as second-class matter at second-class rates until final determination of case.

3. Answer of defendant to amended complaint filed April 24, 1944.

4. Entire transcript of proceedings (three printed volumes) before the Post Office Department Hearing Board, including exhibits offered at hearings before said Board, filed as part of defendant's answer.

5. Pre-trial stipulation before Hon. F. Dickinson  
2037 Letts, approved and filed June 7, 1944.

6. Pages 1, 55 through 144 of the stenographer's transcript of proceedings of the trial of the action before Hon. T. Whitfield Davidson on July 10, 11, and 12, 1944, and exhibits and attached excerpts from opening statements of Mr. Bromley on behalf of plaintiff and Mr. Deinaud on behalf of defendant and colloquy of Counsel and Court, all in connection with proceedings before District Court.

7. Opinion of Judge Davidson filed July 15, 1944.

8. Findings of fact and conclusions of law dated and filed July 24, 1944.

9. Judgment entered and filed July 27, 1944, denying injunctive relief to plaintiff and dismissing complaint on merits.

10. Notice of Appeal filed August 18, 1944.

11. Order transmitting original exhibits.

12. This stipulation.

13. Docket entries.

Dated October 27, 1944.

HUGH LYNCH, JR.,

*Attorney for Plaintiff.*

FRANCIS M. SHEA

*Assistant Attorney General*

EDWARD M. CURRAN,

*United States Attorney for the  
District of Columbia.*

2034

Filed Sep 20 1944

*Order*

It is by the Court this 20th day of September, 1944,  
Ordered:

That the time for filing the record on appeal and docketing the action in the United States Court of Appeals for

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the District of Columbia be, and it hereby is, extended to  
and including November 3, 1944.

DANIEL W. O'DONOGHUE  
*Justice.*

HUGH LYNCH, JR.,  
616 Transportation Building,  
Washington 6, D. C.,  
*Attorney for Plaintiff.*

No objection.

FRANCIS M. SHEA  
*Asst. Atty. General.*

2035

Filed Oct 24 1944

*Order*

It is by the Court this 24th day of October, 1944,  
Ordered:

That the time for filing the record on appeal and docket-  
ing the action in the United States Court of Appeals for  
the District of Columbia be, and it hereby is, extended to  
and including November 16, 1944.

DAVID A. PINE  
*Justice.*

HUGH LYNCH, JR.,  
616 Transportation Building,  
Washington 6, D. C.,  
*Attorney for Plaintiff.*

Consented to:

FRANCIS M. SHEA  
*Attorney for Defendant*

**CIVIL DOCKET**  
**DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA**

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C.C.

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Complaint re: Robert

21. Summary of complaint issued. ... as an  
introduction to the ... of publication ... and the  
... of ...

22. Amended Complaint (issued by ...)

23. Affidavit of ...

24. Exhibit A

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17. Brief of the Authors League of America, Inc. ...

26. Plaintiff's Brief

27. Acknowledgment of Service

28. Motion of ... to Quash ...

(CONTINUED ON P. 415)



Case No. 22821 "Ewing" vs. "Harris" Decided 11/1/1917

1924 July 10 Moscow received letter from G. J. ...

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15 Memorandum opinion of Davidson, J.

24 Findings of fact & conclusions of law

24. PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

27 JUDGMENT DISMISSING. CHAPTER (4)

August 18 No. of apples by Rogers & deposit for same sent by express by Lynch

(Copy of notes mailed by express to Chicago, Ill., and Detroit)

18' East Bond on Appeal in the amt of \$250.00 with Hartford Accident and Indemnity Co as surety

22 Plaintiffs' Exhibits 1 to 25 inclusive

Act 20 Order to transmit original exhibits in case of child to  
U.S. Court of Appeals

Sept. 20 Order extending time to file record to & including  
November 3, 1944 Honolulu

Oct. 27 - Order extending time to file record to and including  
Nov. 10, 1940 - consent.

" 28 Stipulation of counsel, as to contents of record on appeal.

Nov 2. Transcript of proceedings before Davidson and copy

No. 2 Certificate of Receipt by which transcript and copy are duplicates

- Stipulation with respect to changes to be made in stenographic transcripts of proceedings

• stenographic manuscript of proceedings

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United States Court of Appeals for the District of Columbia.  
Filed June 4, 1945. Joseph W. Stewart, Clerk.

United States Court of Appeals, District of Columbia

No. 8899

ESQUIRE, INCORPORATED, APPELLANT

FRANK C. WALKER, AS POSTMASTER GENERAL OF THE UNITED  
STATES, APPELLEE

Appeal from the District Court of the United States for the  
District of Columbia.

Argued April 20, 1945—Decided June 4, 1945

Mr. Bruce Bromley of the Bar of the Court of Appeals of New York, pro hac vice, by special leave of Court, with whom Mr. Hugh Lynich, Jr., was on the brief, for appellant. Messrs. Morris L. Ernst, George S. Collins, Alexander Lindsey, and John F. Harding, all of the New York bar, also were on the brief for appellant.

Mr. Marvin C. Taylor, Attorney, Department of Justice, of the Bar of the Supreme Judicial Court of Massachusetts, pro hac vice, by special leave of Court, with whom Assistant Attorney General Shea and Messrs. Arnold Levy and David Lloyd Kreeger, Special Assistants to the Attorney General, and Edward M. Curran, United States Attorney, were on the brief, for appellee. Messrs. Charles B. Murray and Daniel B. Maher, Assistant United States Attorneys, also entered appearances for appellee.

Mr. Robert E. Conlson, on behalf of Reader's Digest Association, Inc., Mr. Albert E. Brault, on behalf of Authors' League of America, Inc., Mr. Charles A. Horsky, on behalf of the American Civil Liberties Union, Mr. Arthur H. Cleplander on behalf of Curtis Publishing Company, and Mr. Elisha Hanson, on behalf of American Newspaper Publishers Association, each filed briefs as amicus curiae, urging reversal.

Before MILLER, EDGERTON, and ARNOLD, Associate Justices.

ARNOLD, Associate Justice: Esquire is a well known magazine of general circulation. It contains stories, articles, literary and dramatic reviews. Its contributors include distinguished authors, clergymen, and professors in our best educational institutions.

The postmaster General revoked the second-class mailing privileges of this magazine, not on the ground of obscenity but because he thought its dominant purpose was to publish writings and pictures described in his order as being "in that obscure and

treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good".<sup>1</sup> The revocation order would cost Esquire about \$500,000 a year and put it in such a disadvantageous competitive position that it probably could not continue as a current magazine of general circulation.

The theory of the ruling depriving Esquire of second-class mailing privileges, while at the same time permitting it to be mailed at higher rates, is stated by the Postmaster General as follows: "A publication to enjoy *these unique mail privileges* [emphasis added] \* \* \* is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare."

No doubt such a duty exists. But it does not follow that an administrative official may be delegated the power first to determine what is good for the public to read and then to force compliance with his ideas by putting editors who do not follow them at a competitive disadvantage. It is inconceivable that Congress intended to delegate such power to an administrative official or that the exercise of such power, if delegated, could be held constitutional.<sup>2</sup> Congress established the second-class mailing privileges because it believed that periodicals which disseminated public information, literature, art or science deserved to be encouraged on account of their contribution as a class to the public good. But the American way of obtaining that kind of contribution is by

<sup>1</sup> The applicable sections of the Postal Law relating to second-class mail read, 39 U. S. C. §§ 224, 226 (1940):

"§ 224. Second-class matter. Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections 225 and 226 of this title:

"§ 226. Same; conditions admitting publications to. Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows: First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications. Fourth. *It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. Nothing herein contained shall be construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.* (Italics added.)

The above italicized words of the fourth condition are those with which we are concerned on this appeal.

<sup>2</sup> No case has been cited involving the precise facts before us here. However, the broad principles outlined in the following cases make this conclusion inescapable: West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943); Hague v. C. I. O., 307 U. S. 496 (1939); Lovell v. City of Griffin, 303 U. S. 444 (1938); Grosjean v. American Press Co., 297 U. S. 233 (1936); Near v. Minnesota, 283 U. S. 697 (1931); Pike v. Walker, 73 App. D. C. 289, 121 F. (2d) 37 (1941).

See also dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in United States ex rel. Milwaukee S. D. Pub. Co. v. Burleson, 255 U. S. 407 (1921). The majority in the Burleson case does not sustain the position taken by the Postmaster General since it held that the publications involved there were nonmailable.

giving competitive opportunity to men of different tastes and different ideas, not by compelling conformity to the taste or ideas of any government official. This basic idea has nowhere been more eloquently expressed than in the famous quotation from Mr. Justice Holmes, dissenting in *Abrams v. United States*:

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution."

What the Government appears to assert is that the power to charge Esquire an additional \$500,000 a year for use of the mails, unless it conforms to the Postmaster General's notions of the public good, is not a power to censor because the magazine may be mailed at the higher rate. The key to an understanding of this extraordinary contention is found in the Postmaster General's reference to second-class mailing rates as "unique privileges." He appears to think of his duty under the statute, not as administration of nondiscriminatory rates for a public service, but as analogous to the award of the Navy E for industrial contributions to the war. The Navy E is an award for exceptional merit. The second-class mailing rate is conceived by the Post Office to be an award for resisting the temptation to publish material which offends persons of refinement.

But mail service is not a special privilege.<sup>1</sup> It is a highway over

<sup>1</sup> 250 U. S. 616, 630 (1919).

"Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare. Not only this, but the postal system is a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in the management of the Post Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution." \* \* \* *Pike v. Walker*, supra note 2, at p. 297.

Mr. Justice Brandeis dissenting in *United States ex rel. Milwaukee S. D. Pub. Co. v. Burleson*, supra note 2, at p. 430.

"Congress may not, through its postal police power, put limitations upon the freedom of the press which, if directly attempted, would be unconstitutional. This court also stated in *Ex parte Jackson*, that 'liberty of circulating is as essential to that freedom as liberty of publishing.' Indeed, without the circulation, the publication would be of little value." It is argued that although a newspaper is barred from the second-class mail, liberty of circulation is not denied, because the first and third class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial. "The Constitution deals with substance, not shadows." Its inhibition was leveled at the thing, not the name." *Cummings v. Missouri*, 4 Wall. 277, 325.

Mr. Justice Holmes dissenting in the *Burleson* case, at p. 437.

"The United States may give up the Postoffice when it sees fit; but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues; and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man."

"To refuse the second-class rate to a newspaper is to make its circulation impossible, and has all the effect of the order that I have supposed. I repeat. When I observe that the only powers expressly given to the Postmaster General to prevent the car-

which all business must travel. The rates charged on this highway must not discriminate between competing businesses of the same kind. If the Interstate Commerce Commission were delegated the power to give lower rates to such manufacturers as in its judgment were contributing to the public good the exercise of that power would be clearly unconstitutional. Such a situation would involve freedom of competitive enterprise. The case before us involves freedom of speech as well.

Little more need be said to decide this case. Nevertheless, since we hope that this is the last time that a government agency will attempt to compel the acceptance of its literary or moral standards relating to material admittedly not obscene, the voluminous record may serve as a useful reminder of the kind of mental confusion which always accompanies such censorship.

The first source of that confusion is, of course, the age old question when a scantily clad lady is art, and when she is highly improper. Some refined persons are hopeful that an answer to this vexing riddle may some day be found. Others are pessimistic. But whichever school eventually proves correct it is clear from the following cross-examination of one of the expert witnesses for the Post Office that the problem had not yet been solved when the record in this case went to press:

Q. Now that you have heard Mr. O'Brien, could you tell me in your opinion whether that picture is decent or indecent?—

A. Well, taking the expression of the picture and who the person is and what her attitude in life is, I think it is decent. I think the purpose for which you do things in life has a great deal to do with it. It is the motive in those pictures which is harmful.

Q. Will you look at this Exhibit 133, and tell me if this picture is decent or indecent?—A. I think I am being trapped, Your Honor.

Q. You found that out, haven't you?—A. Yes. I knew I was going to be trapped when I came here and I know I shall be in every column tomorrow.

riage of unlawful matter of the present kind are to stop and to return papers already existing and posted, when I notice that the conditions expressly attached to the second-class rate look only to wholly different matters, and when I consider the ease with which the power claimed by the Postmaster could be used to interfere with very sacred rights, I am of opinion that the refusal to allow the relator the rate to which it was entitled whenever its newspaper was carried, on the ground that the paper ought not to be carried at all, was unjustified by statute, and was a serious attack upon liberties that not even the war induced Congress to infringe.

\* Even if second-class mail service actually were a privilege which could be withheld in the Postmaster General's discretion we still do not think it could be used to purchase compliance with his literary standards. If a publication is not actually obscene the publisher's right of free speech is clearly involved. In our opinion the principle of *Terral v. Burke Construction Co.*, 257 U. S. 529 (1922), and *Western Union Telegraph Co. v. Kansas ex rel. Coleman*, 216 U. S. 1 (1910), which involves state imposition of unconstitutional demands on foreign corporations is broad enough to cover this situation. For a comprehensive review of cases supporting this principle see article by Robert L. Hale, 25 Columbia L. Rev. 321 (1935), entitled *Unconstitutional Conditions and Constitutional Rights*.



Q. You haven't been reading the newspapers, have you?—  
A. I read Dr. Marshall's testimony yesterday.

Q. You did?—A. Yes.

Q. Now, just where and how are you being trapped?—A. I am trying to be made a prude. I am not a prude.

Q. Well, would you mind telling me if that picture is decent or indecent?—A. If I had a daughter I shouldn't like to have her photograph in that costume. I have no daughter, I have only sons.

Q. Is that your criterion for decency, Madam?—A. My criterion for decency is anything that is proper, in order, certainly not harmful to human dignity. This woman is evidently by the ocean. I see the ocean there. She has probably come in and out of the ocean and if she stays there all right for me, but I do not wish to see that picture displayed except where it belongs. I believe in suitability, *suitability*; I don't like the picture. It is not pleasing to me and to my eye because I don't believe in such poses.

Now, I am going to be raked, I know, over the coals by those people over there for being a prude? No, I am not a prude. I know I am not a prude; I am a dignified woman who believes in life being lived for a purpose.

Have you ever been to the headquarters of the National Education Society and seen the statute of Horace Mann: "Be not afraid to die unless you have won some victory for humanity." Do you think this sort of thing is winning a victory? I don't.

Q. Well, do you think it is decent or indecent?—A. I think it is indecent. You force me to an answer. I say it is indecent for a picture, not for the beach. You asked me about the picture. Now, I don't know that young lady. On the beach I think it would be all right but not as a picture to be published in a magazine.

Q. This picture, Exhibit 131, do you think it is decent or indecent?—A. I object to it very much.

Q. Do you think it is decent or indecent?—A. Do I have to answer, Your Honor?

Q. I wish you would, please.—A. It is a matter of please?

Q. Yes.—A. Then I refuse to answer. You have shown me enough. You know my state of mind.

Q. Now, why do you refuse to answer?—A. Because I will be misinterpreted.

A second source of confusion in determining what kind of literature furthers public welfare is the dividing line between refined humor and low comedy. To illustrate the difficulty in-



herent in this problem we cite the following colloquy between counsel for the Post/Office and counsel for Esquire. It is typical of hundreds of similar instances.

Mr. BROMLEY. I would like to know, Mr. Hassell, if you don't mind telling me now, just what it is in that article you don't like. I can't find it.

Mr. HASSELL. I would be glad to read it to counsel.

Mr. BROMLEY. Thank you.

Mr. HASSELL. Third column at the bottom of page 144. "He noticed how large the uniform made her behind look."

It may be that the above encourages the use of unscientific terms. Or it may be that it is in the public interest to omit all comment on the part of the lady referred to. Yet it is difficult to make such judgments with the feeling of certainty which one should have when the result of one's decision is to cost a publication \$500,000 annually.

This same kind of uncertainty appears in a third problem which must be faced whenever this censorship is exercised. How far will this reform of periodical literature go if the Postmaster General is given a free hand.<sup>6</sup> For example, recently the New York Times (on Sunday, of all days!) carried the following quip by Mayor LaGuardia on the front page where few churchgoers could fail to see it:

"Sorry. Racing does no one any good. It has nothing to do with horses. It has as much bearing on improving the breed of horses as a bawdy house has on eugenics."<sup>7</sup>

Does this mean that the New York Times will lose its second-class mailing privileges if it does not stop that sort of thing?

The Postmaster General gives serious consideration to this aspect of the problem. His conclusion is that occasional indifference to the public welfare may be indulged by an editor provided that it is not so frequent as to be classed as a habit. His opinion puts it in this way:

"When such writings or pictures occur in isolated instances their dangerous tendencies and malignant qualities may be considered of lesser importance.

"When, however, they become a dominant and systematic feature they most certainly cannot be said to be for the public good, and a publication which uses them in that manner is not making

<sup>6</sup> Over 25,000 publications now have second-class rates. Briefs amicus curiae filed in this case by the Reader's Digest Association, Inc., The Curtis Publishing Company, The American Newspaper Publishers Association, the American Civil Liberties Union, and The Authors' League of America, Inc., indicate that the above question has caused genuine anxiety in our most respectable publishing circles.

<sup>7</sup> New York Times, May 20, 1945.

the 'special contribution to the public welfare' which Congress intended by the Fourth condition."

The Postmaster General appears to think that the improper dominant motive which he suspects from reading Esquire is corroborated by its editor's statement. He quotes the editor as follows:

"The editor of this publication admits that from its origin 'our humor and our articles and our fiction all stressed a man alone angle—you might call it a stag party type of treatment', and testified 'we called it the smoking-room type of humor'."

Now it is well known that when men gather together without the companionship of women an unrefined atmosphere is apt to spread over the entire gathering like a fog. And so the Post Office argues that only an editor indifferent to the public welfare would permit an atmosphere of this kind to dominate his magazine.

Unfortunately this still leaves the dividing line between an occasional vulgar lapse and a vulgar dominant purpose in a good deal of obscurity. It also leaves unsettled the question who is finally to decide what the dominant purpose is. For example, when we turn to the record we find that the weight of the evidence is that the magazine as a whole is unobjectionable. Far more witnesses testified against the Postmaster General's conclusion than for it. They included men of national distinction as writers, scientists and educators. They also included the vigilant New England Watch and Ward Society. The Postmaster General is supported only by five clergymen, a psychiatrist, a lady prominent in women's organizations, and an assistant superintendent of schools. In this situation, assuming the existence of the power to censor, may a court review the issue of dominant vulgarity on its merits?

The answer of the Government is an unqualified no. It contends with some reason that this court has no right to review the Postmaster General's notions of dominant vulgarity if they are supported by substantial evidence. It argues even more persuasively that no right minded man can brush aside as insubstantial the opinions of five clergymen (among whom is a bishop) on what is good for the public.

We think the Government is clearly right in its contention once the power claimed by the Post Office is assumed to exist. There is a practical reason, apart from respect for the testimony of clergymen, why the administrative imposition of literary and artistic standards cannot be reviewed by a court on its merits. Opinions on such matters differ so widely that if the evidence in the record before the Post Office were to be weighed each side would have to continue calling witnesses indefinitely in order not

to be outweighed by the other. We have no doubt that thousands of reputable experts on the public good could have been obtained by each side in this case." We know of no way a court can evaluate the comparative expert qualifications of persons who hold opinions on what the public should read. Once we admit the power claimed here we see no room for effective judicial review of its exercise. And so in practical effect it amounts to a power in the Postmaster General to impose the standards of any reputable minority group on the whole nation.

In addition, the record suggests that the power claimed here would be used by sincere and conscientious officials to bind modern periodical literature to the standards of a former generation. This is dramatically illustrated by the cross-examination of H. L. Mencken, who appeared as a witness for Esquire. No one today would question either Mr. Mencken's eminence or his complete respectability. Yet counsel for the Post Office attempts to impeach his testimony because about twenty years ago an issue of the American Mercury was refused all mailing privileges. It would be difficult to find anyone today who could with reason object to this issue of the magazine. The attempt to impeach Mr. Mencken on this account reads as follows:

Q. Mr. Mencken, you are the author of a story called "Hat-Rack," aren't you?—A. I am not, sir.

Q. You published it in your magazine?—A. I did, sir.

Q. That story had to deal with some sexual activity in a boxcar or freight car?—A. Not specifically. It dealt with people who engaged in sexual activity, but there was no scene of sexual activity in the story.

Q. Was "Hat-Rack" the name of the woman who did that?—A. Nickname. Did you ask who wrote it?

Q. No, sir; I did not.—A. I will tell you if you want to know. It was written by Herbert Asbury, the great grand-nephew of Bishop Asbury, the first American Methodist bishop.

Chairman MYERS. For whom De Pauw University was originally named.

The WITNESS. I didn't know that. There was a report that Asbury was the great-grandson of the Bishop, but the Bishop actually was a bachelor. He is a great-grandson of the Bishop's brother.

By Mr. Hassell:

Q. Mr. Mencken, was the issue of your magazine containing that story declared non-mailable by the Post Office Depart-

\* The printed record in this case apart from several hundred pounds of exhibits contained 1,986 pages.

ment?—A. Yes, sir. I think you ought to let me explain what happened, if you care to.

Q. Yes, sir; go right ahead.—A. The Post Office entered that case rather late. An effort was made in Boston to suppress the magazine as a measure of revenge by the Boston Watch and Ward Society, which we had been denouncing. They proceeded by threatening a newsdealer. The poor newsdealer had no stake in the thing and was willing to subside and withdraw the magazine, so I went to Boston and sold the magazine myself on Boston Common and insisted on the Watch and Ward Society arresting me.

I was arrested, tried, and acquitted.

Meanwhile, subsequent to my arrest, and four or five weeks subsequent to the time the magazine had gone through the mails, the Post Office Department issued an order barring it from the mails. It was a purely imaginary order. There were no more to be mailed.

So I went to court on that and I had injunctions against the Post Office by two Federal judges, both of whom denounced the Post Office as obscene, indecent, unfair, and ignominious.

I agreed with the verdict thoroughly and believe it was just to this minute.

The Post Office tried to hit me in the back when I was fighting with the filthy Comstocks in Boston. I fought the Comstocks and I fought the Post Office, and I put my magazine back in the mails and they have never molested me since.

Q. Didn't the Federal Court in New York refuse to issue an injunction as the case was moot?—A. That is not precisely what happened. I had my injunction in the district courts of Boston and in New York, and the Post Office, pursuing its filthy course of trying to persecute me, appealed to the Circuit and the Circuit after two years decided that the case was completely moot because we were a point of fact through the mails. They decided I could not get relief because the Post Office barring me from the mails was completely dishonest—I wasn't an applicant to the mails.

The three examples cited above effectively illustrate the intellectual standards required for the kind of censorship exercised in this case.

We intend no criticism of counsel for the Post Office. They were faced with an impossible task. They undertook it with sincerity. But their very sincerity makes the record useful as a memorial to commemorate the utter confusion and lack of intelligible standards which can never be escaped when that task is attempted. We believe that the Post Office officials should experi-

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ence a feeling of relief if they are limited to the more prosaic function of seeing to it that "neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds."

Reversed and Remanded.

United States Court of Appeals for the District of Columbia

No. 8899—April Term, 1945

ESQUIRE, INCORPORATED, APPELLANT

vs.

FRANK C. WALKER, AS POSTMASTER GENERAL OF THE UNITED STATES, APPELLEE

Appeal From the District Court of the United States for the District of Columbia

*Judgment*

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Per Mr. JUSTICE ARNOLD.

Dated June 4, 1945.

In the United States Court of Appeals for the District of Columbia

No. 8899

ESQUIRE, INC., APPELLANT

vs.

FRANK C. WALKER, AS POSTMASTER GENERAL OF THE UNITED STATES, APPELLEE

*Designation of record*

The Clerk will please prepare a certified transcript on application to the Supreme Court of the United States for certiorari in the above-entitled case, including therein the following:

1. The printed record consisting of four volumes which appears in the form of a joint appendix.
2. All Exhibits.
3. Opinion.
4. Orders.
5. This designation.
6. Clerk's certificate.

(S) DANIEL B. MAHAR,

*Assistant United States Attorney for the  
District of Columbia, Attorney for Appellee.*

Service of designation of record acknowledged this 14th day of August 1945.

(S) HUGH LYNCH, JR.,  
*Counsel for Appellant.*

United States Court of Appeals for the District of Columbia

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1867 to 1996, both inclusive, constitute a true copy of Volume 4 of the joint appendix to the briefs of the parties and the proceedings of the said Court of Appeals as designated by counsel for appellee in the case of:

No. 8899—April Term, 1945, as the Same Remain Upon the Files and Records of Said Court of Appeals

ESQUIRE, INC., APPELLANT

vs.

FRANK C. WALKER, AS POSTMASTER GENERAL OF THE UNITED STATES, APPELLEE

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 24th day of August A. D. 1945.

[SEAL]

JOSEPH W. STEWART,

*Clerk of the United States Court of  
Appeals for the District of Columbia.*

By C. PRESTON GAINOR,

*Assistant Clerk.*



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Supreme Court of the United States

*Order allowing certiorari*

Filed October 22, 1945

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.